

Tagore Law Lectures, 1912

CODIFICATION

IN

BRITISH INDIA

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BY

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PREFACE.

An attempt has been made in the following pages to point out the great and growing importance of the subject which is not, as supposed in some quarters, merely dry and academic, useful to Jurists and Legislators only. Viewed aright it is interesting and of practical importance to the practising lawyer, the student of history, as well as to the public in general. True, the enumeration of the different enactments in their chronological order forms a part, a minor part of the subject, but this is not the whole subject; it does not exhaust the subject; it is not even the whole history of codification in this country. Codification is a branch of legislation, and law cannot be properly understood apart from the history and spirit of the nation whose law it is, and hence it has been necessary to deal to a certain extent with the legal and constitutional history of India.

Questions relating to the genesis, essence, principle, form and interpretation of the British Indian Codes have been the subject-matter of discussion in a good many reported cases and are of the utmost importance to practising lawyers. In this connection reference may be made to the case of *Secretary of State for India v. Moment* [(1912) 40 I. A. 48, 53] where it has been held that the Government of India can not by legislation take away the right to proceed against it in a Civil Court in a case involving a right over land, and that any Act which takes away such a right is *ultra vires*. Besides these important questions there is the question of the feasibility of further codification in this country. The answer to this question depends on the answer to another question, *viz* whether the present Anglo-Indian Codes have been a success. It has been stated on high authority that they have been "triumphantly successful"; but they cannot be, and are not, perfect, nor exhaustive. It should be noted also that great as the advantages of codification are, it is not the panacea for all the ills human society is heir to. Codes "cannot regulate the time to come, so as to make express provision against all inconveniences, which are infinite in number," and "it is the duty of the Judges to apply the laws not only to what appears to be regulated by their express dispositions, but to all the cases where a just application of them may be made, which appear to be comprehended within the express sense of the law or within the consequences that may be gathered from it" [*Kamini v. Promotho* (1911). 13 C. L. J. 609]. Here comes in the maxim of justice, equity and good conscience; a maxim which has played and is still playing an important part in the history of the development of law and of codification. This maxim has been generally interpreted to mean the rules of English law, if found

applicable to Indian society and circumstances. The proviso is necessary because the English rules of interpretation—in so far at least as these are artificial rules of construction which have arisen in the administration of English Courts of Equity—must not be allowed to govern, for instance, the interpretation of wills, executed before the passing of the Indian Succession Act. In such cases the questions of construction must be determined by the principles of natural justice, or to use the familiar language, according to “justice, equity and good conscience.” [*Skinner v. Naunhal Sing* (1913) 40 I. A. 105, 114] Recognition of this maxim in Japan and British India helps the true construction of codes and development of law, and its non-recognition in Germany sometimes makes the rational interpretation of the German Civil Code impossible as shown by the following case. According to a police by-law, all ladders in towns should be furnished with iron spikes. A burglar, in entering a house by means of a spikeless ladder which he had found on the premises, injured himself and sued the owner of the house for having caused the injuries through contravening the police regulation. A literal construction of Par. 823 of the German Civil Code would have supported his case, and the Judge with considerable hesitation finally decided the case against the burglar (XXIX L. Q. R. 478). But this right of the Judges amounts to the power of making the law, and unless measures are taken to prevent it, the codes are ere long encumbered with a mass of comments and decisions. To prevent this evil it is necessary that codes should be revised and amended at intervals of only a few years.

The subject of Civil Wrongs in this country is still uncodified, though its codification had been advocated by Sir H. S. Maine, Sir James Stephen, Sir Frederick Pollock and other eminent Jurists and Judges. In one branch of this subject, namely on the question whether the use of abusive language without actual damages is actionable or not, there is a difference of opinion between the European and Indian Judges of the different Indian High Courts. The law of Master and Servant as also that of Alluvion and Diluvion require codification. Then lastly there is the important question of codification of the personal laws of the Hindus and Mahomedans. There are judgments of the Privy Council which are against the sentiment of the people, and steps should be taken to restore harmony between the two. Then again the Legislature by the *Hindu Widows Remarriage Act* (XV of 1856) legalizes marriage of the Hindu widow, but deprives her of her rights in her deceased husband's property, and also deprives her of the custody of her children on her remarriage. But it has been held by the British Indian High Courts that when a Hindu widow becomes unchaste after her husband's death, she cannot be deprived of her rights in the property of her deceased husband. The British Indian Courts have gone further and held that when a Hindu mother becomes unchaste after her husband's death she does not thereby lose her right to succeed to the property

of her son. Whether such anomaly ought to continue or not, must be exercising the minds of the members of the society concerned as well as the administrators. Here is abundant scope for the re-ordering of things in the shape of further codification. There are other important questions of law noticed in these lectures, on which there should be uniformity of rules. This brings in the question of how these changes are to be effected, or in other words the question of machinery and material for further codification. The question of the Standing Law Committee or Commission to entertain "complaints against the law" and the question of its rights to discharge the duties of commentators and *Sishtas* of ancient India and to develop the law of the country are questions of vital importance not only to the lawyers but also to the public in general.

Then there is the Imperial aspect of codification. The unifying influence of codes has helped the consolidation of different parts of British India and will help the consolidation of the different parts of the British Empire. The Indian Penal Code has been copied even in some of the British possessions where the full rights of citizenship of British Indians have been questioned. Then, with the passing of the present Indian Copyright Act a new era in the history of codification has begun. This Act has established harmony between the laws not only of the different parts of the British Empire, but also between those of India and most of the other civilized countries of the world. If these lectures succeed in creating a spirit of enquiry into the subjects mentioned above amongst the lawyers and the people, in rousing the legal consciousness of the people and making them take up the subject of further codification and consolidation in real earnest, then my labours will be amply rewarded.

I beg to acknowledge my indebtedness to Sir F. Pollock and Sir C. P. Ilbert for the valuable help I have received from their writings. So far as codification of Hindu Law is concerned I am deeply indebted to Prof. Krishna Kamal Bhattacharyya, Sir Gooroodas Banerjee and the late Prof. Raj Coomar Sarvadhikary for the help I have received from their Tagore Law Lectures.

B K A

Calcutta, 14th May, 1914.

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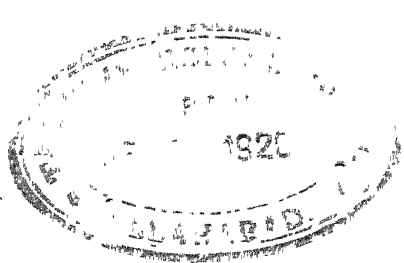




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Triputra v Harimati (1911) 38C 193	345	Weble v Lester (1855) 2 Bom II C.	
		R 52	67
U			
Umacharan v Ajadannissa (1885)		Y	
12C 430, 433	173, 179	Yethrajulu v Mukuntha (1905) 28M	
Umacharan v. Sreebornath 1 C W.		362	383
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TAGORE LAW LECTURES, 1912.

Codification in British India.



CODIFICATION IN BRITISH INDIA

INTRODUCTORY

About half a century ago the Senate of the University of Calcutta, in pursuance of the wishes of the founder of the Tagore Law Professorship expressed in his will, resolved that some branch of Hindu, Mahomedan or Anglo-Indian law should be annually selected by the Syndicate as the subject of the Tagore Law Lectures, such selection being made with a view to the ultimate formation of a body of Institutes of Indian law. In accordance with the resolution of the Senate, the Syndicate within the last forty years selected various branches of Hindu, Mahomedan and Anglo-Indian law as the subjects of the Tagore Law Lectures, and these lectures form a body of Institutes of Indian law. They are valuable materials for the work of codification in this country and some of them will be the basis of some future Anglo-Indian Codes in the same way as Chalmer's Bills of Exchange and Pollock's Digest of the Law of Partnership have been in England. It is in the fitness of things that forty years after the founding of the Tagore Law Professorship, such a subject as "Codification in British India" should be selected for the Tagore lectures, because in dealing with this subject it will be necessary to show how far the object of the Senate has been accomplished and how much the cause of codification has been helped by these lectures. Scientific study of law and preparation of Institutes of law and Digests are important conditions precedent which must be satisfied before any further proposal for codification can be entertained in this country. The fierce controversy between Thibaut and Bentham (representing the Analytical school of jurisprudence) on one side, and Hugo, Savigny and other followers of the Historical school on the other and the struggle between the Boissonadites and Hozumites (or the Revisionists) in Japan and the passing of the German and Japanese civil codes are object lessons

Codification as a
subject for Tagore
Law Lectures

to the students of Anglo-Indian jurisprudence, as showing what an important bearing the scientific study of law and preparation of Digests have on codification. If we must have law and lawyers it is an enormous advantage to have the principles of the law made so clear that every intelligent man may with a little trouble be able to understand them. If it is determined to govern according to law and not by the arbitrary will of the ruler, says Sir James Stephen, "the only way of avoiding quibbles, chicanery and the evils arising from misplaced and selfish ingenuity is to make the law which is to be administered, so clear, short, precise and comprehensive, as to leave the least possible scope for the exercise of those unamiable qualities" (1). The importance of Code Napoleon, the Indian Penal Code, the German and Japanese Civil Codes is due not so much to their merits or demerits, but to the fact that they lay down the law in a clear and precise form.

What is a Code?

Austin

A code according to Austin (2) is a system of statute law, that is, any law (whether it proceeds from a subordinate or from a sovereign source) which is made directly, or in the way of proper legislation, and a code as a systematic and complete body of statute law *should supersede all other law whatever*. The object of a code is, says Bentham, (3) that every one may consult the law of which he stands in need, in the least possible time; and a code should be complete and self-sufficing, should not be developed, supplemented or modified except by legislative enactment. The basis of codification according to Bentham and Austin was the doctrine of Natural Law. The views of Bentham, says Sir C P Ilbert (4) were characteristic of the age in which he wrote; it was an age of great ideals. It underrated the difficulties of carrying them into execution. It overrated the powers of Government. It broke violently with the past. It was deficient in the sense of the importance of history and historical knowledge. It aimed at finality and made insufficient allowance for the operation of natural growth and change. It ignored or under-estimated differences caused by race,

Bentham

(1) *Gazette of India, Supplement 1872 (May 4) p. 529.* Sir James Stephen's article on "Legislation" in Sir W W Hunter's *Life of Earl of Mayo Vol. II*

(2) *Austin's Jurisprudence, Lec XXXVII Student's Ed p. 314.*

(3) *General view of a Complete Code of Laws.* Bowring's Ed. Vol. III. pp. 207, 208

(4) *Encyclopædia of the Laws of England.* Vol. III, 2nd Ed, p 125.

climate, religion, physical, social and economical conditions

Portals, one of Napoleon's law commissioners, speaking of the impossibility of having a Code so universal in its application that it would not require to be expounded, said "We have guarded against the dangerous ambition of wishing to regulate and foresee everything. The wants of society are so varied that it is impossible for the legislator to provide for every case or every emergency. We know that never or scarcely ever in any case, can a text of law be enacted so fair and precise that good sense and equity will alone suffice to decide it. A new question springs up. Then how is it to be decided? To this question it is replied that the office of the law is to fix by enlarged rules the general maxims of right and wrong, to establish firm principles fruitful in consequences and not to descend to the details of all questions which may arise upon each particular topic."

"Since laws are general rules," says Domat, (1) "they cannot regulate the time to come, so as to make express provision against all inconveniences, which are infinite in number, and that their dispositions should express all the cases that may possibly happen, but it is only the prudence and duty of a lawgiver to foresee the most ordinary events and to form his dispositions in such a manner as that, without entering into the detail of the singular cases, he may establish rules common to them all by discerning that which may deserve either exceptions or particular dispositions."

We no longer believe, says Sir C. Ilbert (2) either in the practicability or in the desirability of a code which shall be complete and self-sufficing, which shall absolve from the necessity of researches into the case-law or statute law of the past, which shall preclude the judicial development of law in the future, and which shall provide a simple rule applicable to every case with which the practical man may have to deal. We know that legal rules and legal expressions cannot be severed from their roots in the past. We know that enacted law is most useful if confined to the statements of general principles,

(1) *Domat's Civil Law* Ch. XII, Sec. XXVII. Cushing's Ed. Vol. I p. 88. Strahan's Ed. Vol. I p. LXXXVII. See also *Hurrio C'finder v. Soorodhooce* (1868) B. L. R. Sup. Vol. 985 (S. C.) 9 W. R. 402. *Panchanan v. Dwarka* (1905) 3 C. L. J. 29, 35.

(2) *Encyclopædia of the Laws of England*, Vol. III, 2nd Ed. p. 127.

Halsbury

and that the more it descends into details, the more likely it is to commit blunders, to hamper action and to cramp development "But no state" says Lord Halsbury (1) "begins with a regular system of law. A code is a want developed by progressive and unscientific legislation and the political relations of the citizens to each other give a form and tone to the laws which may ultimately produce confusion and contradiction. But whatever the form of Government may be, the desire to have justice, and to know what the state considers justice, is essential to civilization." This desire to have justice, to know what the state considers justice, to know what the law is in one's own country is generally the root cause of codification, though in some cases, as in British India, the administrative emergencies have led to the enactment of codes.

Code and Cognoscibility of Law.

"A code" says Sir C. Ilbert "is a text book enacted by the Legislature" (2). It is not only impossible to foresee and regulate everything, but it is not also desirable to provide in detail for every possible contingency because excessive elaboration of details tends to cramp the action of the court and in consequence to encourage technicalities (3). The utmost attainable definiteness in legal rules, says Prof. Sidgwick (4) is on the whole to be regarded as a gain, subject to the condition, that the defined law is capable of being known (or "cognoscibility of law" as Bentham calls it) by the persons whose rights and duties it determines. For to lay down rules with extreme precision but in such a manner as to render them practically unknowable by the persons who have to obey them would obviously fail to give the desired security. It is only a minute fraction of the legal code of his country, varying according to the nature of his calling and his social position, that it would practically profit an ordinary citizen to know for the ordinary business of his life. It is, therefore, expedient to facilitate the acquirement by an ordinary citizen of such knowledge of the law of his state as practically concerns him. Here the question arises "whether with a view to the utmost attainable cognoscibility, legislation in a modern state should not merely supplement

(1) *The Laws of England* Vol. I. Intro. CCVIII, CCIX

(2) *Government of India*. p. 341. 2nd Ed.

(3) *Report of the Special Committee appointed to consider the amendments of the Civil Procedure Code of 1882*. Dated 31 August 1907

(4) *Elements of Politics*. 2nd Ed. p. 339

deficiencies in the judicial development of law, but should aim at covering the whole field, by codifying the results, Sidgwick of this development" It seems undeniable that "judge-made" law must *celens paribus* be less cognoscible than statute law, since the binding rules, involved in judicial decisions, so long as they are not authoritatively extracted in a general form, have to be studied and reasoned about as "embedded in matter" enveloped in the circumstances of the particular case, and this must render it more difficult to know and apply them It may be said that the codified law will inevitably have ambiguities and inadequacies which will set the process of judicial interpretation and extension at work again, so that the obstacles to knowledge which codification aims at removing will reappear. but they can hardly reappear to an equal extent, and there seems no reason why they should not be from time to time removed by amending statutes, as done in the case of the Anglo-Indian codes

Sir C P Ilbert, speaking of the advantages of having codes at the celebration of the Centenary of The French Civil Code said "The saying in Eastern Bengal is that every little herdboy carries a red umbrella under one arm and a copy of the Penal Code under the other. How different in England! Here the law is a mystery reserved for lawyers. Not the most intelligent layman can arrive at it with any certainty. Why? Because it lies buried in endless statutes and innumerable cases—the codeless myriad of precedents."

The essence of a code, no doubt, is to be exhaustive on the matter in respect of which it declares the law. On any point specially dealt with by it the law must be ascertained by interpretation of the language used by the legislature. In respect of such matters the Court cannot disregard or go outside the letter of the enactment according to its true construction (1). A code, therefore, binds all courts, in the territories where it is in force, so far as it goes. It does not, however, affect previously existing powers unless it takes them away. Anglo-Indian codes like the Civil Procedure Code (2) the Contract Act (3) the Bengal Tenancy Act (4) are not exhaustive and do not affect the power and duty of the Court, in cases where no

Essence of a Code

(1) *Gokul v Pudmanund* (1902) 29 C 715.
 (2) *Hukuni Chand v Kamalanand* (1905) 3 C L J 67, 71
 (3) *The Inawaddy Flotilla Coy. v Bugwandas* (1891) 18 C. 620, 628
 (4) *Kripa v Annada* (1907) 6 C L J 273

specific rule exists, to act according to equity, justice and good conscience though in the exercise of such power, it must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the legislature

Codification, its meaning

Bentham

Let us see what is meant by the word codification. Bentham introduced this word into the English language. It is sometimes used loosely to include consolidation of statutes, but in its strictest sense it means "an orderly and authoritative statement of the leading rules of law on a given subject, whether those rules are to be found in statute law or in common law." Codification according

Austin

to Austin is the re-expression of the existing law and does not involve any innovation in the matter of the existing law. The opponents of codification, says Austin (1) suppose codification to mean an entire change of all the law obtaining in the country. The alteration of the existing law and the process of merely stating what the law is, are two very different functions, and the confusion between the two has marred many an effort to get a clear and intelligible code. It is a rare exception to change the law in a codifying Act (2). But codification pure and simple (i.e. by a Bill which merely improves the form, without altering the substance of the law) is an impossibility. The draftsman comes across doubtful points of law which he must decide one way or the other. Again, voluminous though the case law may be, there are occasional gaps which a codifying bill must bridge over if it aims at any thing like completeness (3). "By codification, I mean" says Sir James Stephen (4) "the reduction for the first time to a definite written form of law, which had previously been unwritten or written only in an unauthoritative form, such as that of text books and reported cases. By consolidation, I mean, the reduction to a single act of all the written law upon any given subject. The two processes run into each other and are not really distinct."

Sir James Stephen

Lord Esher

Codification, says Lord Esher, (5) is intended to make the law clear for the benefit of the Queen's subjects. Codification, according to Ilbert, is the expression,

(1) *Jurisprudence* Lec. xxxix Student's Ed p 332.

(2) Halsbury's "The Laws of England" Vol I Intro CCIX
Pollock's *Digest of the Law of Partnership* 7th Ed. p IV

(3) Chalmer's *Bills of Exchange*, 3rd Ed. XIX

(4) Hunter's *Life of Earl of Mayo* Vol. II p 177.

(5) *Lee v. Dangar* (1892) 2 Q. B. 344.

in authoritative writings, of law previously to be gathered from traditions and records of a much more flexible and less authoritative character. This word in the Anglo-Indian jurisprudence means the reduction to a clear and compact and scientific form of different branches of law, whether the rules of law codified are to be found in systems of existing law or in the customs of the country or borrowed from systems of law of other countries, "due regard being paid to the feelings of the people generated by difference of religion, of nation and of caste."

Ilbert

Case-law gives particular instances and concrete analogies, from which general rules may be deduced with more or less exactness, and their application to new instances predicated with more or less certainty, but it does not, strictly speaking, lay down general rules beyond the limits which happen to be determined by the precise facts of each case. Every decided case does, within those limits, affirm a general rule, that similar decisions are to be given on similar facts. But investigation of the similarity or dissimilarity of the facts of different cases, for this purpose, is often a matter of great difficulty and nicety, and the power of forming a judgment on such questions can be acquired only by legal training and experience. The framework of case-law consists of the statement of a great number of sets of facts, together with the legal results which have been decided to follow from them. The generalities which make it possible to state the law in a connected form are supplied by a process of discussion, deduction and comment carried on partly by the judges themselves in dealing with the cases, partly by private textwriters. The advantage of case law is that it is full and detailed, and preserves the memory of the remedies administered to the practical needs of men's affairs, rich in experience and fruitful of suggestion. But its great defect is that there is no security for completeness, and only imperfect security for consistency. No security for completeness, because new cases based on different kinds of facts arise every day, and imperfect security for consistency, because it does not prevent co-ordinate and conflicting decisions from standing side by side for an indefinite time. Another defect is that it is intelligible and accessible only to experts and to them only with an expenditure of thought and labour often disproportionate to the end in view.

Difference between Case-law, Statute law and Codified law as framed in British India.

Case-law
Its framework

Statute law, its
use and dis-
advantage

On the other hand Statute law gives general rules of law in definite terms but is deficient in omitting to give particular instances, which are wholly left to be filled in afterwards by judicial decisions, so far as occasion may arise

But such is the imperfection of human language that few written laws are free from ambiguity; and it rarely happens that many minds are united in the same interpretation of them. A statesman told Lord Coke that he wanted to consult him on a point of law. "If it be Common law" said Lord Coke "I should be ashamed if I could not give you a ready answer, but if it be Statute law I should be equally ashamed if I answered you immediately" (1)

Codification.

But the system of codification as adopted in British India, by "Macaulay's invention" of the method of stating the law in general propositions, accompanied by specific illustrations, escapes these evils on both hands by combining the virtues of general enactments with those of specific decisions. By this system the function of case-law is distinctly recognised. But successive revisions at the end of every few years are indispensable for keeping a Code in sufficient working order. In such revised editions of a Code not only such defects as experience has shown to exist in the text may be amended, but cases decided since the last revision may be given as fresh illustrations if they are deemed important and instructive enough; if, on the other hand, any decision has put on the text of the law a construction opposed to the intention of the Legislature, that construction may be expressly negated in the same form.

True, there are evils of hardship, expense and uncertainty due to the want of a Code, which Codification may abate and has in fact abated where the law has been codified. But there are other drawbacks and difficulties inherent in the very nature of legal affairs, which codification cannot remove, although it may possibly mitigate them to some extent. Apart from all questions of form and procedure, the complexity and novelty of men's dealings will always give rise to a certain number of cases not provided for in the Code. All that can be aimed at by codification is "to round and compress the law relative to the experience of the past, and to start it afresh with provisions for its accommodating itself to the requirements of

(1) Lord Teignmouth's *Memoirs of Sir William Jones* p. 261.

new times, without losing its accessibility and certainty" (1).

On the question of practicability and desirability of codification, as on most juridical questions, there is a great deal of difference of opinion amongst the followers of the Philosophical and Historical Schools of Jurisprudence. The followers of the Philosophical School, Thibaut, Bentham, Austin and others were staunch supporters of codification. The followers of the Historical School destroying the doctrine of Natural Law thought that they had also destroyed the basis of codification, but that doctrine is not the only basis of codification. Savigny, the great apostle, if not the founder of Historical Jurisprudence and the great opponent of codification exaggerated the theoretical defects in existing codes and underrated their practical utility. He ignored Bentham's half truth that "he who has been least successful in the composition of a code has conferred an immense benefit." He pushed too far the familiar argument that codification checks the natural growth of the law and arrests its development. He overrated the ability and willingness of what he called the "national consciousness" meaning thereby, practically the legal profession, to effect legal reform and adapt law to the requirements of the day without the assistance or compulsion of the legislature. Lastly he underrated the forces which were making for codification in Germany. The German people were struggling towards national unity; national unity meant unity of law, and unity of law could not be brought about without codification (2). It is beyond human ingenuity to produce a code that will be complete and self-sufficing and will not require exposition, but it is possible and quite practicable to have a code which will make the law accessible to almost every body and will contain general principles by reference to which questions may be decided.

The subject of codification may be considered either (1) in the abstract, that is, whether a good and complete code (or at least as complete as possible) is better than a body of law consisting of judiciary or "judge made" and customary law or (ii) in the concrete, that is, whether having regard to the circumstances of a given community

Practicability of Codification

Thibaut and Savigny.

Codification in the abstract and in the concrete

(1) *Encyclopaedia Britannica* 8th Edition, "Codification"

(2) Ilbert's *Legislative Methods and Forms*. P. 127. See also Thibaut's discriminating and impartial remarks on the dispute between the two schools in his book "*On the influence of Philosophy on the exposition of positive law*" and Student's Austin p. 334.

it is expedient to attempt the reduction of the law to a code. Under the first head viz, codification in the abstract, we shall deal with the objections generally raised against codification

Objections to Codification first objection inherent incompleteness of codes.

It is sometimes said that individual cases which may arise in fact or practice are infinite and, therefore, they cannot be anticipated and provided for. True, an ideal Code is an impossibility, and no Code can be complete or perfect, but it may be less incomplete than case-law or customary law. The Code may be brief, compact, systematic and therefore knowable as far as it goes and many devices (as those adopted by the Indian Law Commissioners) may be hit upon to remove the defects incidental to Codes. One of these devices is "Macaulay's invention" of adding authoritative illustrations to the enacting text of a Code. This method of stating the law is the greatest specific advance that has been made in modern times in the art called by Mr Symonds "the mechanics of law-making" (1). It is an instrument of new constructive power, enabling the legislator to combine the good points of statute law and case-law while avoiding almost all their respective drawbacks.

Devices to remove this defect.

Illustrations

The necessary incompleteness of a Code together with the power of the Courts of Justice of putting their own sense on the laws, may be the source of another danger, viz, the danger of a Code being overlaid with an accumulating mass of comments and decisions, as happened in the case of the French Civil Code. This is an evil which no mode of framing the law itself can completely exclude, but for the prevention of which the enacted law ought, at intervals of only a few years, to be revised and so amended as to make it contain as completely as possible in the form of definitions, of rules, or of illustrations, everything which may from time to time be deemed fit to be made a part of it, leaving nothing to rest as law on the authority of previous judicial decisions. On such occasions opportunity should be taken to amend the body of the law under revision in every practicable way, and specially to provide such new rules of law as might be required by new interests and new circumstances in the progress of society (2). "Such re-enactments" says Sir James Stephen (3),

2nd objection : Danger of being overlaid with mass of comments and decisions. Remedy, revision.

(1) *Encyclopædia Britannica* 8th Edition, "Codification"

(2) See the Report of Lord Romilly and other Law Commissioners in the *Gazette of India Extraordinary* 1864 July 1, page 54 Also the letter of 14th October 1837 from Macaulay to Lord Auckland

(3) See *Gazette of India Supplement* 1872 (4 May) page 531.

“will, in my judgment, be as necessary as repairs are necessary to a railway. I do not think that any Act of importance ought to last more than ten or twelve years. At the end of that time, it should be carefully examined from end to end, and whilst as much as possible of its general framework and arrangement are retained, it should be improved and corrected at every point at which experience has shown that it required improvement and correction.”

It is sometimes suggested as we have seen above, that codification checks the natural growth of the law and hinders its free development. This objection may apply to bad, but not to good codification. No country has studied law, both historically and systematically, with more fruitful results, than Germany. In no country has codification been more successful. “The scientific formulation of existing rules, provided the mistake is not made of attempting to stereotype details, illustrates and brings into prominence their defects, and thus stimulates their judicial development and suggests and facilitates legislative amendments.”

3rd objection
It checks the
natural growth
of the Law

The next objection is “that if a body of law affected to provide for every possible question, its provisions would be so numerous that no judge could know them all: and as to the cases which it left undecided the ‘conflicting analogies’ presented by those cases would be in exact proportion to the number and minuteness of its provisions.” This objection proceeds on the mistake of supposing that a Code must provide for every possible concrete case. It consists of two parts, and the answer to the first part is, “that either the future case must be provided for by a law or it must be left to the mere *arbitrium* of the judge; and the incompleteness inherent in statute law is not avoided by making no law.” The second part of the objection is founded on the supposition that the provisions of a Code are more minute and numerous than the rules embraced by a system of judiciary or customary law and therefore it is supposed that the rules are more likely to conflict. But as a matter of fact a rule made by judicial decision or by custom is almost necessarily narrow. Whilst statute law may be made comprehensive and may embrace a whole *genus* of cases, instead of embracing only one species which it contains (1).

4th objection
Hugo's objection

(1) Austin's *Jurisprudence*, Lec xxxix, Student's Edition, pages 333, 334.

5th objection.
The provisions of
the Code must be
defective and
incoherent.

The fifth objection is that codification being the work of several men, no determinate leading principles will be followed consistently by the makers of the Code and therefore its provisions must be defective and incoherent. This objection is applicable only to Codes where these principles are wanting and not to Codes in general. The Twelve Tables—the French Civil Code—the Anglo-Indian Codes—the German Civil Code—are the results of the labour not of one man but of several. Then again there is nothing to prevent a Code from being the work of one man, on the contrary, we should remember that the leading and guiding conceptions of a Code must be the work of one luminous intellect. MM Lanyrie and Dubois (of the Ministry of Justice in France) have said that the task of compiling the Code of Portugal was entrusted to M Antonio Luis de Seabra, Professor in the University of Coimbra, alone, and that with the exception of two amendments on *nationality* and *marriage*, his projected Code became the Code Civil of Portugal (1)

6th objection
It will not touch
difficult questions

It is sometimes said that it is not worth while codifying the law, when codification only makes easy cases easier. The reply is that easy cases are beyond comparison the more numerous in practice. It is not true that difficult cases will be left as they are even if the law is codified, for a well-designed codification of any important branch of the law would remove many existing occasions of difficulty. Questions which in framing a Code it would be impossible to pass over, are now unsettled, either because the point has not distinctly arisen or because it has arisen and has been avoided, thus becoming surrounded with uncertain and more or less conflicting *dicta*. Such questions would have to be dealt with and reduced to certainty one way or another, and a considerable amount of possible dispute would thus be cut short.

7th objection.
Its want may be
supplied by private
expositors.

The seventh objection is that "in an age capable of producing a good Code, no Code is necessary, the want being supplied by private expositors." The reply to this objection is that although good expositions render a Code somewhat less necessary, they cannot take its place. A Code is the expression of the will of the sovereign and the judges are bound to abide by it (2), but an exposition,

(1) *The Law Times* (April 24, 1897) Volume cii, 574

(2) Except in the case of the Judges of the Supreme Court of the United States of America, who have power to declare whether any Act of any of the State legislature is invalid as being *ultra vires*.

however well constructed it may be, being unauthorized, is not binding on judges. Such Expositions and Digests may be the groundwork of Bills which may afterwards become Acts, e.g., Chalmer's Digest of the Law of Bills of Exchange, Pollock's Digest of the Law of Partnership. In all probability such digests and expositions will greatly help codification of the law in future in British India.

The eighth objection to codification is "that a Code makes the defects of the law more obvious, and therefore emboldens knaves." The answer is that knaves who know or take good advice upon the pitfalls of the law, have probably open to them greater opportunity to deceive others, in the uncodified than in a codified state of the law. "Whatever may be the case in other departments of things," says Sir James Stephen (1), "homoeopathy is the only system by which the malady of litigation and quibbling can be treated. The real antagonist of the pettifogger is the almost equally unpopular Legislative Department."

8th objection.
It emboldens
knaves

The next objection is based on the alleged failure of the Codes compiled in France, Prussia and other countries, by order of the respective Governments and established by their authority. The answer is that the failure of a particular Code, even admitting its failure to be as complete as affirmed, proves nothing against codification in the abstract; that particular Code might have failed, not because it is a Code, or by virtue of its qualities as a Code, but by reason of its faulty construction. Then again, the alleged failure is not so complete as affirmed. All the continental nations of Europe have codified their laws, and none of them shows any sign of repenting it. In India a good deal of codification has been carried out, and public and professional opinion seems almost unanimous in its favour (2).

9th objection
Alleged failure of
existing Codes

True, as the world has grown wiser with the march of time, each school of jurisprudence has somewhat abated of its pretensions and has each taken what is good from the other; yet we can hear the dying echo of distant din of clashing swords of the knights of the different schools across the seas (3). Notwithstanding

(1) *Supplement to the Gazette of India* (May 4) 1872, page 29

(2) Chalmer's *Bills of Exchange*, 7th Ed p. lii

(3) See Sir Courtenay Ilbert's article on *Codification* in the *Encyclopædia of the Laws of England*, 2nd Ed vol iii, 125 and his *Legislative Methods and Forms* Chapter on Codification *Contra* Sir Roland Wilson's "*Digest of Anglo-Muhammadan Law*" 3rd Ed p. 52, and his paper in the October (1898) number of the *Asiatic*

Codification in the concrete

these objections to codification, almost all the jurists of the present day hold that a good and complete Code is better than a body of law consisting merely of judiciary and customary law; but they differ on the question of codification in the concrete i. e. "Whether having regard to the circumstances of a given community it is expedient to attempt the reduction of the law to a Code." The most important question in this connection is what should be the basis of codification—whether the codes should be based only on the laws prevalent in the country or whether the rules of the laws of other countries should be introduced and mixed up with the indigenous law and the amalgam should be the basis of codification, and if so, to what extent the principles of foreign law should be introduced. The controversy between the *Romanists* and *Germanists* in Germany and the *Boussonadites* and *Hozumites* (or "the Revisionists") in Japan at the end of the last century centered round this point and the want of a satisfactory answer to this question is the stumbling block in the way of the Anglo-Indian jurists in British India. To what extent the rules of foreign law should, together with the rules of Hindu and Mahomedan law and custom, be incorporated into the Anglo-Indian Codes is a thorny question and will remain so for sometime to come. Before dealing with the question of *codification in the concrete*, I shall say a few words about the place of codification in jurisprudence.

Codification, its place in jurisprudence.

The conception of a Code as a symmetrical classification, terse and clear expressions of the rules of law, is essentially a modern thought. In the infancy of mankind, no sort of legislature, nor even a distinct author of law, is contemplated. At that period we find that "Law has scarcely reached the footing of custom—it is rather a habit—it is in the air." The first period in the history of law is the "epoch of judgments." Patriarchs and kings are spoken of as if they had a store of "themistes" or judgments ready to hand for use. Kingship at this period depended partly on divinely given prerogative, and partly on the possession of superhuman strength, courage and wisdom. Gradually, as the impression of the monarch's sacredness became weakened, the royal power

Heroic Age and age of Aristocracies

Quarterly Review. See also the article "Is law for the people or for the Lawyers?" by his Honor Judge Emdin in the *Nineteenth Century and after* for 1901, p. 871. And the Symposium in the *New Century Review* June 1897, by Sir C. P. Ilbert, Sir Roland Wilson, Dr. Blake Odgers and Mr. Courtney Kenny.

decayed, and at last gave way to the dominion of aristocracies. Then came the epoch of customary law. From the period of customary law we come to the era of Codes. The conception of a deity dictating an entire Code seems to belong to a range of ideas more recent and more advanced than those prevalent in the heroic age or in the epoch of customary law (1). The races which peopled Persia and India, like those who went to Greece and Italy, had their heroic age, the era of aristocracies, the epoch of customary law and of Codes. But in the East a military and a religious oligarchy grew up separately, nor was the authority of the King generally superseded. Contrary to the course of events in the West, the religious element in the East tended to get the better of the military and political (2), and in India we find *Parasuram*, the son of *Jamadagni* and the grandson of *Bhishu* the promulgator of the Institutes of Manu, defeating the Kshatriyas, in several battles and "denuding the world of the Kshatriyas." Thus happened the great revolution in the constitutional history of ancient India in consequence of which there was a separation of the legislative power from the executive authority. the legislative authority was then vested in Brahmans, who were under no pretence, to take any share in the Government of the State or the management of the revenues, while the executive authority was vested in the 'Kshatriyas' (3). But this separation of legislative power from executive authority could not reduce the kingly dignity to a dependent and secondary office, because the Hindu King by retaining the command of the Army and the Revenue of the State, had in his hands "the distribution of gifts and favours, the potent instrument of patronage," and jealousy and rivalry of the different sets of competitors gave the kings great influence over the Brahmans. In course of time the Kshatriyas regained their supremacy, but could not retain it long because the Nanda prince *Mahapadma*, who is compared to *Parasuram*, destroyed the Kshatriya power again. The Kings who succeeded Mahapadma are spoken of as having been Sudras. Thus happened the second political revolution

Era of customary Law and of Codes

Parasuram and separation of Legislative power and Executive Authority in Ancient India

(1) Maine's *Ancient Law*, p. 6.

(2) *Ibid* p. 11

(3) For the application of this principle of separation of the legislative from the executive authority to the subject of codification of the personal laws of the Hindus and Mahomedans see Lees, xi and xii.

in ancient India and the Kshatriyas were superseded by Sudras (1).

Ancient Codes
Their Value

The refined considerations now urged in favour of codification were not the considerations which made for codification in ancient time. The ancient Codes were originally suggested by the discovery and diffusion of the art of writing. Inscribed tablets were seen to be a better depository of law, and a better security for its accurate preservation, than the memory of a number of persons however strengthened by habitual exercise. The value of the ancient Codes did not consist in any approach to symmetrical classification, or to terseness and clearness of expression, but in their publicity, and in the knowledge which they furnished to everybody as to what he was to do, and what not to do. In these Codes the religious, civil and merely moral ordinances are mingled up without any regard to differences in their essential character (2).

Codification in
Ancient India

The system of Hindu Jurisprudence, like Roman Jurisprudence, begins with a Code. Soon after the great political revolution in India about the end of the twelfth century B C (3), mentioned above, legislative assemblies of Bhrigu, Yagnyavalkya and other sages assembled in different parts of India. In recognition of *Parasuram's* services during that political revolution the people nominated his grandfather Bhrigu president of the supreme legislative assembly. Thus in Manu Ch. I. Ver. 60. we read "Bhrigu, great and wise, having thus been appointed by Manu to promulgate his laws, addressed all the *rshis* (sages) with an affectionate mind, saying, Hear "

Then again Yagnyavalkya, grandson of Viswamitra (the sage), is described in the introduction of his own institutes, as delivering his precepts to an audience of ancient philosophers, assembled in the province (legislative council) of Mithila. The *Mitakshara*, an excellent commentary on Yagnyavalkya was composed by Vignyaneswara and is really a digest.

Though these Codes are mainly based on the laws observed or ordained to be observed at the time of their

(1) *Bhagavata. Skandha. XII* 8. 9

(2) Maine's *Ancient Law*. Ch. I. pp 14, 15, Banerjee's *Hindu Law of Marriage and Stridhan*. 3rd Ed pp 2, 7, Sastri's *Hindu Law of Adoption* p. 79.

(3) There is a great deal of difference of opinion about the antiquity of the Institutes of Manu. I have given the date given by Sir W. Jones and Prosanna Kumar Tagore.

compilation, they do not represent the entire body of laws actually obtaining in the Hindu community of the time (1). To some extent, they rounded off and compressed the law relative to the experience of the past, and started afresh with the provisions for their accommodating themselves to the requirements of new times. They deal with both the Adjective (the constitution of courts, procedure and the law of evidence) and Substantive law (under eighteen heads called the topics of litigation, according to Manu). The Mitakshara adds another head under the "Miscellaneous," comprising some matters not included under the eighteen topics and the proceedings initiated by the King (2). But these codes were sealed books to many and were accessible to a few only. Then, again by allowing the answers of the *sishtas* (3) to have the force of law and there being no means of authoritative revision, according to the present sense of the expression, they were in course of time encrusted with the comments and decisions of *sishtas* which were not always consistent with each other, with the result that these codes lost one of the essential elements of a good code viz. certainty. But whatever might be the defects of Manu's Institutes, they furnish a noble example of ancient codification. The history of the Muhamedans furnishes a long series of attempts to codify their laws. In the earliest days of the Caliphs of Bagdad, books were compiled under the authority of the Caliphs to supply the requirements of a code. These books from their very names indicate that they were meant to be Codes. The attempt at codification (in India) continued down to the time of the Moghul Emperor Aurangzeb, and in the Fatawa-i-Alamgiri, we find perhaps the most magnificent and most durable monument of that remarkable monarch's reign (4).

Codes of Manu and
Yagnavalkya.

Fatawa-i-Alamgiri

(1) Banerjee's *Hindu Law of Marriage and Stndhan*, page 4.

(2) Sastri's *Hindu Law of Adoption*, p. 81. For the discussion on the question whether these codes are complete, see Maine's *Ancient Law* page 17 and Sastri's *Hindu Law of Adoption* pages 81, 82. Also Maine's *Early Law and Customs*, Lectures I and II. K. L. Sarkar's Tagore Lectures on *Mimamsa Rules of Interpretation*, p. 17.

(3) *Manu* Bk. XII, 108, 109 "if it be asked how it should be with respect to (points of) the law which have not been specially mentioned, the answer is "that which Brahmins who are *sishtas* propound shall doubtless have legal (force). Those Brahmins must be considered as '*sishtas*' who in accordance with the sacred law have studied the Veda together with its appendages, are able to adduce proofs perceptible by the senses from the revealed texts." In Bk. VIII Ver. 3 the word "*Sastras*" has been translated by Sir W. Jones as "codes" but by Burnell and Hopkins as "treatises."

(4) Abstracts of Proceedings of the Council of the Governor-General 1882 (26th January) page 64.

Code of Hammurabi. Hammurabi was the sixth king of the First Dynasty of Babylon and reigned for fifty-five years, about 2,250 B. C. He codified the existing laws that "the strong might not oppress the weak, that they should give justice to the orphan and widow and for the righting of wrong" We have in this carefully drawn series of laws a code a thousand years older than the Mosaic age, older, as some authorities think, than the laws of Manu or Minos or any system of ancient legislation. There are indications in this code to show that many of the laws codified by Hammurabi are of far greater antiquity than his reign. The whole Code including the Prologue and Epilogue, originally contained about three thousand lines of writing, divided into 49 columns on a monolith, but five columns on the front have been erased. The Code proper occupied nineteen columns and is divided into about 280 clauses and is introduced by the words "Law and Justice I established in the land, I made happy the human race in those days" About the reason of the erection of this monolith and its inscription the king tells us:—"The law of the land as to the judgment, the decisions of the law as to decisions, my precious decrees for the information of the oppressed, upon this stone I wrote and placed in the temple of Merodach in Babylon" The remarkably simple wording of the text, the purest language—freedom from ideograms—show that it was evidently intended to be consulted by all who were "poor and afflicted" (1) This code shows a most careful and systematic order, beginning with witchcraft, which perhaps connects it with a religious code; it passes through all grades of social and domestic life, ending with a scale of official wages for all classes of workmen, even the lowest in the scale

Its aim.

Three essential features of the code.

The following are the three essential features of this code:—(1). It is based on personal responsibility and the *jus talionis*, and tempered with the law of ransom. (2) The belief in the sanctity of the oath before God, as in the Hebrew Code (3) The absolute necessity of written evidence in all legal matters "as became a nation of scribes" Among the commercial laws are some, of much interest at the present time, relating to licensed premises. It is curious to note that all wine-merchants were females. "If riotous persons assemble in the house of a wine-merchant and those riotous persons she seizes not

(1) See Harper's *Code of Hammurabi*.

and drives to the palace that wine-merchant shall be put to death." "No votary or woman, not residing in the cloister, might open a wine-shop or enter one for drink on pain of being burned." The most striking feature in *domestic* legislation is the high position and legal protection extended to women. The laws of property are full and based on an equitable system.

Of Draco's famous Code not a single line remains, and all we know of it is derived from a few scattered notices occurring mostly in late Greek authors. Solon abolished the whole of Draco's legislation on account of its harshness and severity, except in cases of murder. All that Draco did was to put in writing the customary law of his time and nation. Draco composed his Code in his old age and was smothered to death in the theatre at Ægina, with caps, chitons and cloaks which were thrown at him by an enthusiastic audience. Lycurgus, of Sparta composed his code *circa* 884 B. C. (1). The provisions of his code are not so severe as those of Draco. Solon of Athens instituted new courts of judicature and framed a judicious code of laws, which afterwards became the basis of the laws of the XII Tables in Rome.

Greek Codes
Draco, Lycurgus
and Solon.

The celebrated system of Roman Jurisprudence begins with the Twelve Tables which absorbed or superseded the royal laws and afforded protection to the people against the frauds of the privileged oligarchy and also against the spontaneous depravation and debasement of the national institutions. Timely codification of customs, according to Maine, prevented degradation of the national institutions. But the ascription of such an effect to the Twelve Tables, says Sir F. Pollock (2), goes beyond what is warranted by our knowledge of the state and tendencies of Roman society under the earlier Republic. It is certain that conversely codification at a later stage may arrest a normal and scientific development. The Twelve Tables themselves went near to stereotype an archaic and formalist procedure, and the Romans of later generations escaped from great inconvenience only by the devices of legal fictions and equity.

The Roman
Codes.

The laws of the Twelve Tables were gradually supplanted by the decrees of the Senate and the annual edicts of the praetor. The uncertainty of the law was to some extent removed when "instead of the Twelve Tables,

(1) Lycurgus, according to some authorities, had the laws of Minos of Crete as his guide in framing his laws.

(2) *Law Quarterly Review*, Vol. XXI p. 171.

Roman codes
The Gregorian,
Hermogenian
and Justinian
Codes. Institutes
of Gaius.

the perpetual edict was fixed as the invariable standard of civil jurisprudence” During four centuries, from Hadrian to Justinian, the public and private jurisprudence was moulded by the will of the sovereign. Although Justinian’s collection is distinguished by the appellation of *Code*, by way of pre-eminence, yet there were codes before his time ; as, first, the Gregorian Code and Hermogenian Code, a collection of the Roman laws made by two famous lawyers Gregorius and Hermogenes, and including the constitutions of the Emperors from Hadrian to Diocletian and Maximian, and secondly, the Theodosian code, in sixteen books, formed out of the constitutions of the Emperors from Constantine the Great to Theodosius the younger, and observed almost all over the West, till it was superseded by the Justinian Code. The code prepared by the order of Justinian was a compilation from the labours of preceding lawyers, not “a pure and original system of jurisprudence” This Code was so unsatisfactory, even to Justinian himself, that it was revoked within six years after its promulgation and replaced by a new and more accurate edition of the same work, which he enriched with two hundred of his own laws and fifty decisions on intricate points of law. The Digest or Pandects which embodied in fifty books, with little order, the *dicta* of the lawyers, the Institutes, founded on those of Gaius, and the Novels, successively issued, completed the body of laws, which have shed a lustre on the name of Justinian.

Justinian’s code.

Austin points out what he describes as the enormous fault of Justinian’s Code, considered as a code, that it is a compilation of statutes and judicial decisions, a heterogeneous mass of subjects having no other relation, than that they are all of them imperial constitutions, that is, statutes and orders emanating from the Emperor directly and not from the subordinate legislatures or tribunals. The rule of Roman Jurisprudence, which did not allow judge-made laws to supplement the Codes, saved them from being overlaid with conflicting decisions and comments.

Breviarium Aniani, Papiani Responsorium.

The Roman Codes did not disappear with the decline and fall of the Roman Empire. The perpetuity of the Roman Law from the fall of the empire, until the regeneration of sciences and letters is the fundamental idea of Savigny’s “*The History of the Roman Law in the Middle Ages*” The Roman Codes appeared amongst the Visigoths as the *Breviarium Aniani* of Alaric, amongst the Burgundians as the *Papiani Responsorium*. Roman

Law continued to rule amongst the Franks also (1)

In dealing with the subject of codification in modern times, I shall give a short history of codification in different countries showing what steps were taken to have the law codified—how the law has been classified for codification—how codification in one country has influenced codification in another—how after the doctrine of natural law was exploded by the Historical School of Jurisprudence, the definition of a code was changed—how codification has been successfully attempted though the doctrine of natural law was destroyed. As in the Republic of Letters so in Jurisprudence there should be no narrow spirit of sectarianism or exclusiveness. The authors of the Indian Penal Code compared their work with the most celebrated systems of Western Jurisprudence and derived much valuable assistance from the Code Penal of France and from the Code of Louisiana, prepared by the late Mr Livingstone (2). The Italian codes are modelled on the French Codes. The draftsmen of the New York Penal Code had the Indian Penal Code before them, and the framers of the Indian Contract Act, on the other hand, consulted the draft Civil Code of New York and made such use of it as they thought desirable. Even the French Code was retained in parts of Germany where French rule was detested (3). Again, the classification of the law for the purpose of codification adopted in one country, may be a helpful guide for the same purpose in another country. The Japanese Civil Code in its general arrangement follows German models. Japanese civil law, says Hozumi (4), has “passed from the Chinese family to the Roman family of law.” These are some of the reasons why I should give here a short history and description of the codes of other countries. I shall begin with the first code of modern times viz., the *Prussian Landrecht* or the Prussian Code of Frederick the Great.

The second half of the eighteenth century is a period of great intellectual activity in Europe, it matured the intellectual movement which culminated in the French Revolution and the final overthrow of the political ideas

Modern Code

The Prussian Code.

(1) See Guizot's *History of Civilization* Lec. XI and Gibbon's *The Decline and Fall of the Roman Empire*. Ch. XLIV

(2) See the letter from Lord Macaulay and his colleagues to Lord Auckland, October 14, 1837. Also Cameron and Elliott's Draft Indian Penal Code, page 189

(3) See the article on the Centenary of the Code Civil in *The Times*, 31st October, 1904

(4) *Civil Code* p. 19.

The Prussian
Code Classification of the Law

of the Renaissance, and which in the domain of metaphysical and scientific enquiry removed the fetters and obstacles of mediæval prejudices. It was quite in accordance with the spirit and tendencies of this movement to adopt and perfect the doctrine of natural law which Grotius, Pufendorf and others had begun to expound in the seventeenth century, and under the influence of this theory Frederick the Great instructed his Chancellor Cocceji, to prepare a code on a rational basis. "On the 15th September 1747" says Carlyle (1), "Cocceji had an interview with Frederick, and the decisive fiat was given: 'yes, start it on, in God's name! Pommeru, which they call the *Provincia litigosa* try it there first'" Cocceji, sixty-seven years old, then set about the first Code of Civil Law of the modern times. The first part of the draft code appeared in 1749 under the title of "Draft of the Corpus Juris Fredericiani" The influence of natural law can be traced in general expressions and the outward form of the draft of 1749, but in its practical rules it is merely a reproduction of Roman law. This circumstance, together with the fact that it was to supersede all local customs, made it very unpopular, and Cocceji's death in 1755 and the outbreak of the Seven Years' War in 1756 prevented its completion. But Frederick the Great did not abandon his intention, and in 1780 he instructed Cormer to prepare a new scheme of codification. Cormer, in his turn, entrusted some parts of the work to his assistant Suarez, and they jointly produced the code which under the title of "*Allgemeines Landrecht für die Preussischen Staaten*," came into force on June 1, 1794 (2).

Local customs
subject of separate codification

The Landrecht was not to interfere with local customs, which were to form the subject of separate codification(3) but only two codes embodying local customs were completed. The parts dealing with the law of inheritance and the effect of marriage on property were at first suspended and the previously existing law on these subjects continued, but the suspension was gradually withdrawn almost everywhere. The *Landrecht* is divided into an

(1) *Frederick the Great* Book XVI, Chapter I

(2) Frederick the Great died in 1786 and there were great difficulties to contend with as Wöllner (who became minister of State after the death of Frederick the Great) denounced the code as too revolutionary. It is doubtful whether the code would ever have been accepted by Frederick William II, had not the partition of Poland in 1793 necessitated the introduction of German law into the new province for which purpose the new code seemed most appropriate.

(3) Similar methods should be adopted if further codification is to be attempted in India.

introduction and two principal parts. The introduction deals with the general effects of the code and contains a number of legal maxims. The first part contains the provisions relating to the rights and duties of individuals as such. The second part deals with the rights and duties attaching to individuals by virtue of their family relations or their social or economical status, and also contains a chapter on Criminal law. This arrangement of the code would hardly be called scientific, but it gives evidence of an intelligent purpose.

The chief fault of the code was tersely pointed out by Frederick in a marginal note to the last instalment of the second part submitted to him in 1781, which reads as follows "It is a very fat book, and statutes must be short and not lengthy." It was intended by the authors of this code that all contingencies should be provided for with such careful minuteness that no possible doubt could arise at any future time. The judges were not to have any discretion as regards interpretation, but were to consult a Royal Commission as to any doubtful points, and to be absolutely bound by their answer. This stereotyping of the law was in accordance with the doctrine of the law of nature, according to which a perfect system might be imagined, for which no changes would ever become necessary, and which could therefore be laid down once for all, so as to be available for any possible combination of circumstances. In the course of time this proved a mistake, the Commission was dissolved, the right and duty of the judges to interpret the law so as to give effect to changes in the general conditions of things, came to be recognised. The great defect in the Prussian code was the want of provision for amendment and revision of the code. The interpretations emanating from the Law Commission and the judges existed in a separate state, and there had been no attempt to work them into the code, or to amend it in pursuance to it. Many of the provisions of the code became obsolete, others were expressly repealed by subsequent legislation, but the main principles remained and many of them received full recognition by the authors of the New German Civil Code.

The next great code of modern times is Napoleon's Code Civil (1). The nineteenth century was essentially

(1) The name first given to it was "*Code Civil des Français*," the title "*Code Napoleon*" was imposed by statute in 1807, withdrawn in 1816, re-imposed in 1852 and again withdrawn in 1870, the present title is Code Civil. Notice the relation of the name of the Code with the political changes in France.

Its contents

Its defect Bulk;

No discretion as regards interpretation.

Influenced by the doctrine of the law of nature.

Want of provision for amendment and revision.

Code Civil an era of codes It opened with Napoleon's Code Civil and closed with the German Civil Code and in the interval it witnessed the production of codes in India, Italy, Spain, Portugal, Turkey, several states of the United States of America and also in some of the South American States (Chilian and Mexican civil codes) Code Civil was planned in 1800 A D. The original scheme was prepared in little more than four months by a commission consisting of Trouchet, Malleville, Portalis and Bigot Preameneu ; it was then submitted to the Council of State, where it was discussed article by article Its arrangement proceeds on the three-fold principle of subdivision of law viz , the law of Persons, the law of Things and the law of Acts. The law of Persons is called the "law of the enjoyment and deprivation of civil rights " The law of Things is called "the law of things and the various modifications of property," and the law of Acts is called "the law as to the modes of acquiring property " The book dealing with the last named matter also refers to those modes of acquiring property which arise through family relations, and are in the Prussian code included in the law of persons, and further contains the rules as to obligations arising from contracts or torts, which cannot logically be described as modes of acquiring property in any sense. The characteristic feature of this code which gives it a great advantage over the *Landrecht* is the short summarizing statements which precede the principal heads.

Code Civil. Its advantage over Landrecht.

In this code, for the first time in the history of legislation, broad principles are laid down, the application of which is left to those whose duty it was to administer the law. But there being no provision for amending or revising the code there was no means of keeping the growth of judiciary law explanatory of and supplementary to the code, within reasonable limits, by working such law into the code from time to time. Thus round the code has grown a large accretion of legislation wholly unlike it, and the demand for a careful recasting of many parts of it has become very pronounced.

Its defect.

This work of Portalis and his co-adjutors is more potent in spreading and maintaining the influence of France than her victories. The success of the code beyond the borders of France has been remarkable It penetrated into Belgium, Italy and Switzerland. It was introduced into countries like Poland and the kingdom of Naples, which had scarcely emerged from a mediæval

condition. It affected the codes of Chili and Mexico, is the basis of the civil code of Lower Canada and is in force in the island of Mauritius. It was retained in parts of Germany even where French rule was detested. Its influence can be traced in the recent legislation of Japan. Modern commentators and specially those who examined the Code from the point of view of economists, have found in it evidence of the antiquity of many of its elements and of their antagonism to the so-called principles of 1789. Few of the wild speculations as to property and labour which were in circulation when codification was first projected found their way into the final form. Some of the provisions, especially those as to Master and Servant, were probably less indulgent to the latter than the public opinion of the time approved. It is also alleged that the Code is notably behind the legislation of other countries in regard to the rights of women as to property and their children, and some enthusiasts suggested, at the time of the celebration of the Centenary of the Code, that the Centenary should be celebrated by publicly burning a copy. Lawyers as a rule praise it, but men of letters, dramatists, novelists, critics and economists of a certain class are prone to assail it. "It has" says Sir Courtenay Ilbert, "familiarized all Frenchmen with the principles of law which they have to observe, and it has supplied a model which other nations have eagerly and extensively copied. The leading provisions of the French Code have become household words. They are the topics of village conversations, they enter into popular literature; and allusion to them on the stage is at once caught up by the audience: in a word they have become part of the lifeblood of the nation" (1).

Code Civil,
Its value.

Codification of the Austrian law had been a favourite scheme of Empress Maria Theresa, who appointed a commission for the purpose in 1713; a draft was finished in 1767, but it was rejected. A second draft was subsequently prepared, and its first part dealing with a portion of the law of persons only, was passed in 1787 under the name of Josephine Code. This code was in force in 1896 only in a part of the Bavarian Province of Suabia. The present Austrian code was passed in 1811. It is mainly an embodiment of Roman law. It is more logical in its systematic arrangement than the Prussian, or French code

Codification in
Austria
Josephine Code.

(1) See 9 C W N p 1v (55). The French Code of Civil Procedure was enacted in 1807, the Code of Commerce in 1807, the Code of Criminal Procedure in 1808, the Penal Code in 1810, the Forest Code in 1827..

Like the *Code Civil* it is divided into three parts viz., 1. The law of persons. 2. The law of things 3. Provisions common to the law of persons and things. But the provisions on the subjects dealt with in the third book of the French code are here included in the second, which is subdivided under two main heads, viz., rights *in rem*, and rights in *personam*. The first book unlike the French code excludes all rules belonging to the domain of public law.

The Italian,
Portuguese and
Spanish Codes

The Italian, Portuguese and Spanish codes are modelled on the French Code and therefore share its defects, though there are great improvements in these codes in matters of detail. The Italian code was promulgated in 1837; Code Civil Portugais in 1867; and the Spanish code in 1887. The Portuguese Civil Code (as we have it in the translation of MM Lanyrie and Dubois of the ministry of Justice in France) is divided into four books. The first book refers to civil capacities of persons, the second to the acquisition of rights, the third to the right of ownership; the fourth to civil responsibility and evidence. These four books have got 2538 articles in all (the Code Civil has 2281 articles). The wording of the Portuguese code is a model of brevity and succinctness.

Codification in
Turkey.

Since the days when Sultan Mahmoud inaugurated the era of reform, the whole legal and administrative life of Turkey has been forced into new moulds. The *Hatti Humayoun* was published in 1856 and in the twenty-five years succeeding this epoch-making event Turkey has been given a new system of law. The motive of the codification in Turkey was not the desire to make the law of the country cognoscible to the Turks, but the Turkish Codes are the result of the constitution of the new Turkish Tribunals. The Nizam Courts having to apply at once statute and Sher' Law, and the knowledge of the Sher' residing only in the breasts of the religious judges, the new tribunals were placed under the presidency of persons learned in the doctrines of the religious courts. The members of the courts, knowing nothing of the Sacred Law, and being entirely in the hands of the presidents, began to indulge in unworthy suspicions of these dignitaries (1). The commercial courts again, having in a great many matters to apply the Sacred Law and knowing nothing about it, had to refer questions to the Sacred

(1) See the *Report of the Mejelle Commission* (Chief Justice Tyser's translation).

courts. The only solution, therefore, was a code to make the Sacred Law accessible not only to the judges alone, but also to the administrative officials throughout the empire. Thus, codification in Turkey, as in British India, is to a great extent the result of administrative exigencies. At the present time the sphere of uncodified law in Turkey corresponds with that of the jurisdiction of the Sher' courts, which includes the questions of "divorce, marriage, alimony, emancipation from slavery, *lex talionis*, will and inheritance, thus the uncodified law is coterminous with family law." A Penal Code, a Commercial Code and a code of Maritime Commerce have all been enacted and these codes are based on the French model. The whole civil law, except the purely religious portions and those dealing with *status personæ*, has been codified by Mejlle or civil code. The law of procedure has also been codified.

The German savants took nearly the whole of the nineteenth century for the compilation of the German Civil Code. The old German empire was broken up in 1806, and after the Battle of Waterloo, the Congress of Vienna caused the German confederation to be formed, many of the smaller territories being absorbed by the neighbouring states, but the diversities in the law still continued. About this time Thibaut, the great Germanist, the champion of the philosophical school and the distinguished professor of Roman law, in his essay "On the necessity of a general Municipal (or National) Law for Germany," treated the preparation of a code or a body of law "clear, precise, and adapted to the requirements of the time," as one of the first conditions of a strong and efficient confederation. But Savigny, the Romanist, the great apostle of the Historical school in his well-known work "On the Vocation of our Age for Legislation," opposed the project of Thibaut "on account of the insufficient development of legal science, and also on the ground that the German language was not sufficiently formed for the purpose." Apart from these temporary reasons he objected to codification generally, he relied on the slow evolution of legal doctrine by historical forces as opposed to direct legislation on *a priori* principles. But Savigny underrated the forces which were making for codification in Germany. "The German people were struggling towards national unity; national unity meant unity of law and unity of law could not be brought about without codi-

The German
Civil Code.

The German
Civil Code.

fication" (1) It is a strange irony of fate that some twenty years after the publication of his pamphlet, Savigny undertook the task of bringing out a revised edition of the Prussian code (thereby admitting that the time was then ripe for legislation) but he failed to bring the task to a satisfactory conclusion. The period from 1815 to 1848 was barren in the field of legislation, but the national feeling which the wars of Napoleon had aroused in Germany, though discouraged by the political rulers, was fostered by the intellectual leaders, was slowly gathering strength and power. It was one of the forces that brought about the revolutionary movement of 1848, and from that time it became clear to the German sovereigns that it could not be disregarded. The immediate result was a new activity in the field of national legislation. The first Code which was adopted as the law of all the German States dealt with the law of Bills of Exchange. It was discussed by the representatives of all the states and promulgated as a law of the short-lived empire of that period, and was either confirmed or introduced as a separate state law in the different states between 1848 and 1859. The German Mercantile Code was in a similar way passed as a state law by most of the individual states between 1862 and 1866. The Reichstag passed a resolution for the unification of the whole German Civil Law in 1871, but the Confederate States refused their assent till 1873, when it was agreed to by all the states concerned that the whole law, Civil, Criminal and Procedure, was a federal matter. In 1871 the Bills of Exchange Code and the Mercantile code were re-enacted as Imperial laws. A criminal code passed in 1870 for the North German Confederation also became the law of the Empire. Codes of civil and criminal procedure, and a code organizing the courts throughout Germany on a uniform system and establishing a supreme court of Appeal and the Bankruptcy code came into force in 1879. The other important Imperial legislations were the Marriage and Registration Act, the Law of Copyright and Trade Marks, the Patent Law and the laws as to compulsory insurance. But as to the matters not regulated by the Imperial Codes and Statutes the local law was still applicable (2).

(1) *Ibert's Legislative Methods and Forms*, page 127

(2) "Speaking broadly," says Schuster "it may be stated that out of a population of forty-two and a half millions, eighteen millions are governed by the Prussian Code, fourteen millions by the German

These different codifying statutes are the fruits of the labour of different law commissions. On July 2, 1874, a Commission, consisting of eleven members (six judges, three officials in the ministries of justice of certain States, and two university professors) was appointed to prepare a draft Civil Code for the German Empire. The procedure adopted by this commission in compiling the code may be useful in considering the question of codification in British India in future, and I shall mention here how these commissioners proceeded to work. The work was divided into five parts, which were apportioned among five members of the Commission, who were respectively to prepare drafts relating to the parts entrusted to them. The business of the draftsmen was to collect materials as to the existing law, to consider how far they could be used, and each, besides drafting his part, was to furnish a summarized statement of the materials and of his manner of dealing with the same. The draftsmen were to hold regular meetings, in which they were to discuss the form and language of the code as well

First German
Commission, 17

Common law, which remains the modernized law of Justinian, seven and a half millions by French law, two and a half millions by Saxon law and half a million by Scandinavian law. There are therefore six general systems of law, but only two out of these, the system of the French and that of the Saxon code, are exclusive systems, the other systems are broken into by the manifold local laws and customs. These local rules relate more especially to the laws of inheritance and law relating to the effect of marriage on property. The number of variations and subdivisions is sometimes almost comical. It may happen that a boundary line runs through a house or that even two boundary lines divide one building into three parts, and a story is told of a town in Bavaria in which the several estates of three persons respectively dying in different rooms of one house may have to be administered according to three separate systems, moreover the line of separation is not always geographical only, it also separates the various strata of the social edifice; thus in the towns of Macklenburg—Strelitz the effect of marriage on property is different in the case of a shop-keeper and in the case of a Government official. In several German states the nobility are under a law of their own. In the city of Brunswick the wives of traders being creditors to their husbands are postponed to creditors, whilst the wives of other persons have a privileged claim for their dowry. In addition to this, the geographical divisions separating the systems of law as a general rule do not coincide with the political divisions. The result is that in every case which arises in Germany, the following questions must be asked—Is there any Imperial Statute? Is there any local modern statute? Is the subject affected by older legislation? What local law governs it? The confusion which arises from this state of things may easily be imagined, and it will not surprise anybody that the unification of German law was one of the things which was most eagerly asked for on the formation of the German empire. In British India, so far as the laws of inheritance are concerned, one hundred and sixty millions of His Majesty's subjects are governed by the different schools of the Hindu law including Sikhs, Jains and others who are not really Hindus, about sixty millions by the different schools of Mahomedan law.

How it worked

as such matters of principle which were relevant to the whole, or at least to several parts, and also all questions as to the systematic arrangements and the determination of conflicts of jurisdiction between several parts. Four out of the five parts were completed in seven years (1). From December 1880 to October 1881, the meetings of the draftsmen were interrupted to give all members time to study the proposed drafts. In October 1881, the second stage of the work began, during which the draft was gone through section by section, and an elaborate procedure was adopted for the purpose of securing the proper drafting of the amendments; the whole draft as amended was then again submitted to the commission for discussion and finally settled at the end of the year 1887. Thus the work of this commission had taken thirteen years, out of which seven were used for the first drafting and six for the revision. The report of the commission was then published and submitted to all the legal and business men of Germany, with the result that there were six folio volumes of criticism. On December 15, 1890, another commission was appointed for the purpose of preparing a second draft on the basis of the first, but with due regard to the expressions of opinion on the first. This second Commission also consisted of eleven members, out of whom eight were Government officials, two were University professors, and one a practising lawyer. Only two members were retained from the First Commission. In addition to these regular members a number of temporary members were appointed for specified purposes, among whom there were several laymen. The second draft was completed and published in 1895. This amended project was approved by Reichstag in 1896 and became law in 1900. The introduction to this code contains 218 sections and the code itself consists of 2,385 sections. It contains no commercial law and very little of procedure. The introductory portion defines the scope of the code and regulates its position in international private law; it is divided into four parts; the first treating of private international law, regulates the conflict between the code and foreign laws; the second deals with the conflict between the code and other federal laws; the third regulates the legislative relation between the Civil Code and the laws

The second German Commission, 1890.

Second Draft.

(1) On the death of the draftsman, the part dealing with the law of obligations was abandoned altogether and the Dresden Draft was substituted as the basis of discussion.

of the Confederated States, and the fourth deals with various matters connected with the promulgation of the code. The code itself is divided into five books. Each book is divided into sections (corresponding to chapters in the Indian codes) and these sections are again subdivided into various parts, which in their turn are subdivided into paragraphs (corresponding to the sections in the Indian Codes) and numbered consecutively. Book I contains a number of general and introductory laws, which have some connection with and are common to all branches of law, e.g., elementary and fundamental provisions relating to persons (natural persons, legal persons, associations, &c.) things, legal acts, limitation, prescription, &c. Book II treats of the law of obligations and contracts. Book III deals with possession, law relating to immovable property, servitudes, pre-emption, mortgages, Bills of Sale, &c. Book IV deals with family law (marriage, guardianship, &c.). Book V with the law of succession, including wills.

Its contents.

The critics of the German Civil Code may be divided into two classes. One class of objectors (called the "pompous pedants" by Schuster) says that the code is not German and that it represents only a slightly Germanized system of Roman Law. "It is vain to tell them that the influence of German law has been very marked throughout all the parts of the code, that in their opinion is not sufficient. They say that Roman law is constructed on a principle differing altogether from the principles of German law, and that the German law ought to abandon that principle. They do not heed, or perhaps they regret, that the thought of the educated classes in Germany has now for four centuries been under the influence of classical culture, of which the Roman law is by no means the worst product; that the Roman Law itself is, by a large number of persons, looked upon with familiarity and fondness, that there never was any common Germanic law, and that neither they nor their Germanistic predecessors have succeeded in reducing the Germanic law into a scientific system. What these learned men would like is a return to the time when *status* was everything and contract was nothing. But they know quite well, or at least they ought to know that the great elemental forces which determine the economical life of nations are not diverted from their course by the affected and artificial aspirations of a retrogressive romanticism."

German Civil Code and its Critics

The second class of objectors (called "the factious fanatics") includes various different sections. There is the section who takes up the German cry. They are the people who wish to re-introduce race distinction into modern life, and who affect to look upon the Code as made in the interest of those whom they wish to treat as intruders. Their argument is rhetoric and most of their facts are fiction, but unfortunately they are not a *quantité négligeable* in German public life. The ultramontanes stand on more solid ground; to them obligatory civil marriage and the possibility of divorce *a vinculo* are abominations, and some of them will not sanction any code which affirms those institutions. Another section opposes the code on the ground that it is not sufficiently socialistic in its tendencies, and that in manifold ways it withholds the protection to which the weak are entitled in their struggle with the strong. In answer to these opponents it can be proved that in several respects the code goes further in the direction of socialism than any previous legislation.

Thus we see that almost all the European nations have codified their laws and none of them show any sign of repenting it, on the contrary, most of them are now engaged in remodelling and amplifying their existing codes (1). I have already stated that some of the South American States notably Chili and Mexico, have got their codes based on Code Civil. Now I shall see how the United States of America have advanced in this respect.

Each state in joining the confederacy gives up much of its sovereignty in favour of the Central Government, which alone is entitled to legislate on matters relating to 1 Taxation, 2 Commerce, 3 Money, 4 Weights and Measures, 5 Army and Navy, 6 Foreign Policy, 7 Post and Telegraph. On the other matters each State can frame its own law. Most of the States have codes stating the law of pleading in civil actions, and such States are often described as *Code States* to distinguish them from those adhering to the older forms of actions, divided between those at law and those in equity. A few States have general codes of political and civil rights. The general drift of legislation and of public sentiment is toward the extension of the principle of codification, but contrary view has been ably maintained (2). The oldest American code is the Civil Code of Louisiana passed in 1808. This code

(1) See Chalmer's *Bills of Exchange*. 7th Ed. p. lli.

(2) See *Encyclopædia Britannica*, 9th Edition, Codification.

was based on the French law. An amended code was passed in 1824, which has since been revised from time to time. Livingstone's code of criminal law and procedure was completed in 1824 and was published in a complete form in 1833, that is, shortly before Lord Macaulay and his co-adjutors were setting about their task of framing codes for India. They admit their indebtedness to this code in their letter dated 14th October, 1837 to Lord Auckland. The State of New York appointed Mr. David Field, with four others for codifying the substantive and remedial law of the state. This commission framed a code of civil procedure which was enacted by the State in 1848; and a code of criminal procedure which became law in 1881. Their penal code became law in 1882, but the civil code was twice passed by the legislature but was twice vetoed by the Executive and is still in abeyance (1)

Codification in England.

In England, says Sir Courtenay Ilbert; "the law is a mystery reserved for the lawyers. Not the most intelligent layman can arrive at it with any certainty. Why? Because it lies buried in endless statutes and innumerable cases—the codeless myriad of precedent." England is not yet within a measurable distance of a civil or criminal code; but some progress has been made towards that end by the passing from time to time of various acts codifying different branches of law. The principal ones are—the Bills of Exchange Act 1882 (45 and 46 Vic. c. 61), the Interpretation Act 1889 (52 and 53 Vic. c. 63), the Partnership Act 1890 (53 and 54 Vic. c. 39), the Trusts Act 1893 (56 and 57 Vic. c. 53), the Sale of Goods Act 1893 (56 and 57 Vic. c. 71), Marine Insurance Act 1906 (6 Ed. VII. c. 41). A Bill for Criminal Code was brought in 1870, but was dropped. Codification in England is greatly indebted to private authors of different Digests, which have been used as the groundwork of Bills which finally became Acts of Parliament (2). A commission was appointed in 1866, to "enquire into the exposition of a digest of the law of England and the best means of accomplishing the object, and other ways of exhibiting in a compendious and classical form the law as embodied in judicial decisions." This commission, as the best solution of the question, recommended a digest, that is, a condensed summary of the law as it exists arranged in

"Codeless myriad of precedent."

(1) Ilbert's *Legislative Methods and Forms* Page 155. Burge's *Colonial and Foreign Law*. New Edition Vol. I pp. 38, 39

(2) See Chalmer's *Bills of Exchange*, Pollock's *Digest of the Law of Partnership* Introduction.

England.

systematic order under proper titles and subdivisions, and divided into definite statements or propositions, which should be supported by reference to the sources of the law whence they were severally derived, and might be illustrated by citations of the principal instances in which the rules stated have been discussed or applied. An attempt is now being made by Lord Halsbury in his "Laws of England" to carry out in its main outlines the recommendation of the commission appointed in 1866, by bringing together different treatises upon various divisions of the law, by different authors (1). "He who has been least successful," says Bentham, "in the composition of a code has conferred an immense benefit," and even if this attempt of Lord Halsbury were unsuccessful his Lordship would help the cause of codification in England to a great extent.

Japanese legal history.

To the student of comparative legal science, and specially to the student of the Anglo-Indian jurisprudence Japanese law is of interest by reason of its long history and because of the extent to which its development has been modified by the reception and assimilation of foreign institution. The present Japanese legal system is derived from Occidental nations, but the power of assimilating Western ideas Japan owes to nobody, it is the native genius of her people. Japanese legal history is generally divided into three great periods:—

I, Period of indigenous civilization.

(I) The period of indigenous civilization, which terminated with the reception of Chinese ideas and institutions in the seventh century of the Christian era.

II, Period of Chinese influence and feudalism.

(II) The period in which Chinese culture remained dominant closed with the year 1868. This period is subdivided into two parts (a) from the seventh century to the end of the twelfth century, when the feudal system was fairly established. The so-called laws of the emperors and of the feudal princes were not addressed to the people; they were kept secret from the people (2). They were instructions issued to subordinate officials (b) In the second part of the second period, from the close of the twelfth century until the latter part of the nineteenth century, the feudal principalities were independent in legislation and in adjudication, and the development of law and custom was, as in Europe in the Middle Ages, particularistic. In 1867 Japan had as many divergent

Development of law and customs particularistic.

(1) Lord Halsbury's *The Laws of England*, Vol. I p. CXXVI.

(2) Hozumi's *Civil Code*, p. 19.

laws and customs as existed in Germany and France a century earlier, and as exist in British India even at the present time. "The written laws of some three hundred principalities were modified by local customs of even more restricted validity, and across the territorial laws and customs there ran a well-defined class distinction "

(III) From 1868 down to the present time, this is the period of occidental influence. The re-establishment of the Imperial supremacy in Japan in 1868 dealt the death blow to feudalism and helped the promulgation of a common national law. This result has been achieved not by the gradual development of a settled practice in central courts of last resort, as in imperial Rome, but by the more rapid process of legislation, as in modern continental Europe. The Japanese imperial legislation of this period is mainly based on the laws of Germany, France and England. "In the Japanese reception of West European law" says Mr. Munroe Smith of Columbia University "it is interesting to observe that, as in the reception of the law books of Justinian in mediæval Europe, the completed formal reception was preceded by a theoretical or scientific reception. The whole process was startlingly rapid; Japan passed in single years through stages which in mediæval northern Europe extended over generations, but the stages were the same. In the first stage the schools took the leading part. Japanese students absorbed foreign law at Paris and at the English Inns of Court, at Leyden, Leipzig and Berlin, just as the North-Europeans, seven centuries earlier, had absorbed Roman law at Bologna and other European Universities. Almost simultaneously occidental law began to be taught in Japan. In a separate law school attached to the department of justice and in two or three private law schools French law was taught, and also 'natural law'. This latter 'law' was simply general West European law viewed from a French angle. English law was taught in the Imperial University of Tokio from 1874. In 1887 legal instruction in the University of Tokio was reorganized in four sections. English law, French law, German law, and "political science." Simultaneously, as in the theoretical reception of Roman law in mediæval Europe, there was an attempt to popularize the foreign law by translations and treatises in the native tongue. In 1870 was established a Governmental bureau for the "investigation of institutions," and one of the first products was a transla-

III Period
of occidental
influence

Reception of
West European
laws in Japan

Formal reception
preceded by a
theoretical, scientific
reception.

Attempt to popularize
the foreign
law by translation
ect.

tion of the French Codes. On the heels of this scientific reception came the practical reception. In 1875 a law was issued providing 'that judges should decide civil cases according to the express provisions of written law and, in cases where there was no such written law, according to custom. In the absence of both written and customary laws, they were to decide according to the principles of reason and justice. This law flung wide open the door for the ingress of foreign law. . . . The rapidly changing circumstances of Japanese society brought many cases before the courts for which there were no express rules, written or customary, and the judges naturally sought to find out "the principles of reason and justice" in Western jurisprudence' (1).

Genesis of the
Japanese Codes

Codification in Japan has been hastened by the desire of the Japanese Government to abolish the privileges of foreigners and to subject them to the territorial law, and by the counter-demand of the foreign governments that the territorial law should be such as their citizens could comprehend and respect (2). The Japanese were, at the end of the last century, struggling towards national unity; national unity meant unity of law, and unity of law could not be brought about without codification. With the consolidation of the Japanese empire, codification, at least of a large portion of Japanese law became an established fact. In 1870 a penal code was published, in 1880 appeared a new penal code and a code of criminal procedure; in 1890 a new code of criminal procedure, a code of civil procedure, and a commercial code; in 1890-91 a civil code, which never came into force; in 1896 and 1898 a new civil code; and in 1899 a revised commercial code. In the first stage of codification in Japan there was a tendency to accept the foreign law too eagerly and too thoroughly, with an accompanying sacrifice of vital elements of indigenous customs. This tendency is noticeable in the first drafts of Japanese civil code, which were so largely based on the French Civil Code that they aroused opposition not only on the part of Japanese who had studied English or German law, but also on the part of some who had been trained in French law. In 1891 a draft civil code largely framed by Professor Boissonade, a French jurist, was adopted by the council of state and it was to

(1) Cf. the principle of "justice, equity, and good conscience" embodied in the Charters of the Indian High Courts and the Civil Courts Acts in British India.

(2) Hozumi's *Civil Code*, pp 5, 6.

come into force in 1893. Agitation for postponement and revision of Prof. Boissonade's code began in which Hozumi, who had studied in the English Inns of Court, and later in German universities, led the opposition. Hozumi declared that it was disgraceful that the work of preparing a national code should have been entrusted to a foreigner. In the Japanese Parliament such an appeal to national sentiment found ready sympathy. In 1892 the enforcement of Prof. Boissonade's code was postponed, and a committee of revision was appointed of which all the members were Japanese. A sub-committee consisting of Hozumi, Ume, and Tomii, was in charge of the work of revision. The code submitted by this sub-committee was not a mere revision of the code of 1891, but a new and independent work. All the principal Codes of the modern world were examined, but Japanese conditions and customs were kept steadily in view. Hozumi's code was accepted with some modifications by the full committee and by the Japanese Parliament, 1896-98. In its general arrangement the Japanese civil code follows German models. In its substance it is a product of comparison and selection (1). Hozumi characterizes the struggle between the supporters of the code of 1891 and the "Revisionist" as a conflict between the school of natural law and the historical school, and compares it with the famous German controversy between Thibaut and Savigny, which involved the question of codification in the abstract. We should notice here that in Japan both parties were in favour of codification, in order to get rid of particularistic laws and customs, and the opposition to the code of 1891 was patriotic. This struggle more closely resembles the later German controversy between the Romanistic and Germanistic schools. The fact, that of all the social relations with which the present Japanese civil code deals, the family remains least affected by occidental influences, makes the history and present organization of the Japanese family of special interest to the student of Anglo-Indian jurisprudence.

The history of codification in British India may be roughly divided into three periods:

I From 1601 A. D. to 1765 A. D. i.e. from the date of the Charter granted by Queen Elizabeth to the London East India Company to the time of the grant of Dewanny to the East India Company.

(1) Hozumi's *Civil Code*, pp. 6-12.

Prof. Boissonade's
Japanese Civil
Code

Hozumi's Code

Product of
comparison and
selection

British India.

II. 1765 to 1833 covering the period of Regulation Laws

III. 1834 to the present time, *i.e.* the period of partial codification

The Genesis
of the Anglo-
Indian Codes

In British India administrative exigencies led to the enactment of codes suitable to and sufficient for, the requirements of the situation. The Anglo-Indian Codes have been framed because it was necessary to draw up for the guidance of young judges and magistrates a set of rules which they could easily understand and which were adapted to the condition of the country (1). The legitimate object of codification in India, as given by Sir J. Stephen's *dictum*, is that of "providing a body of law for the Government of the country so expressed that it may be readily understood and administered both by English and Native Government servants without extrinsic help from English law libraries." In our own day the net result of the great activity of the Indian Legislatures has been to substitute for a considerable body of indigenous law and custom, for much judge-made law embodied in judicial decisions, and for a great number of fragmentary and long-winded regulations, a body of statute law, fairly systematic and compact and based mainly on English principles. Of the indigenous law the part which has been least affected, though it has not been left wholly untouched by legislation is that family law which was specially safeguarded by Warren Hastings' plan of 1772.

In such parts of the law as are not covered by the Acts of the Indian Legislatures the Hindus and Mahomedans continue to live under their respective laws. But the Hindu and Mahomedan laws have not stood unchanged, for the effect of the more careful and thorough examination, which the contents of these two systems have received from advocates, judges and text-writers, both Indian and English, imbued with the scientific spirit of Europe, has been to clarify and define them, and to develop out of the half-fluid material more positive and rigid doctrines than had been known before. In those departments in which the pre-existing customs were not sufficient to constitute a body of law large enough and precise enough for a civilized court to work upon,

(1) See *Harington's Analysis Introduction Vol. I Supplement to the Gazette of India 1872 (May 4) page 533* *Ilbert's Government of India page 339. Legislative Methods and Forms, 160.*

the English found themselves obliged to supply the void. Thus the legislatures sometimes legislated on such subjects. Sometimes the courts boldly applied English law, and sometimes they supplemented native custom by common sense, that is, by their own ideas of what was just and fair. The expression "equity and good conscience" was used to embody the principles by which judges were to be guided when positive rules, statutory or customary, were not forthcoming.

The genesis of the Anglo-Indian Codes.

The codifying Acts will be mentioned in their proper place, but mere enumeration of those enactments will not exhaust the subject of this course of lectures because that will not even be full history of codification, while the subject of our lectures does not merely mean the history of codification but something more. It means (a) History of codification what has been and what is being done towards codifying the laws of the country and (b) whether further codification in this country is possible. I have said that mere examination of the different Regulations, Ordinances, Rules and Acts will not give a complete history of codification because mere statement of facts is not history "Every historical matter may be considered under three different points of view, and imposes a triple task upon the historian (1) He can, nay, he should first seek the facts themselves, collect and bring to light, without any aim than that of exactitude, all that has happened. The facts once recovered, it is necessary to know the laws that have governed them; how they are connected; what causes have brought about those incidents which are the life of society, and propel it, by certain ways towards certain ends. Facts, properly so called, external and visible events, are the body of history; the members, bones, muscles, organs and material elements of the past; their knowledge and description form what may be called *historical anatomy*. But for society, as for the individual, anatomy is not the only science. Not only do facts subsist, but they are connected with one another, they succeed each other, and are engendered by the action of certain forces, which act under the empire of certain laws. There is, in a word, an organization and a life of societies, as well as of the individual. This organization has also its science, the science of the secret laws which preside over the course of events. This is *Physiology of history*.

Anatomy of history.

Physiology of history

Neither historical physiology nor anatomy are com-

(1) Guizot's *History of Civilization* Vol II pp 2, 3.

Physiognomy of
history.

plete and veritable history. You have enumerated the facts, you have followed the internal and general laws which produced them. Do you also know their external and living Physiognomy? Have you them before your eyes under individual and animate features? This is absolutely necessary, because these facts, now dead, have lived—the past has been the present; and unless it again become so to you, if the dead are not resuscitated, you know them not; you do not know history. Could the anatomist and physiologist surmise man if they had never seen him living?

The research into facts, the study of their organization, the reproduction of their form and motion, these are history such as truth would have it ”

Adopting these three different points of view under which every historical matter may be considered, I shall first deal with the *anatomy of the history of codification* in British India in the First Lecture i.e. it will be a research of and criticism upon historical elements—the framing and passing of different Statutes, Ordinances, Regulations and Acts relating to the good government of British India, arranged chronologically. Then I shall deal with the *Physiology of the history of codification* in British India i.e. how the different Regulations, Ordinances and Acts relating to any particular branch of law, are connected with one another—how they have succeeded each other—how the condition of people influenced codification in this country and what the causes were which brought about the passing of different Acts and Regulations, which were the life of the society, and propelled it, in certain ways, towards good government of the country (1)

Then I shall deal with the *Physiognomy of the history of codification* in British India. True, upon such a subject, there can be neither characters nor scenes to reproduce; and personages are texts, and the events, publication or abrogation of law. Still these legislative reforms belonged to societies which had their manners and their life and in which there had been a progressive movement. The provisions of some branches of Hindu law had been influenced and transformed by Mahomedan law, and those of the Mahomedan and Hindu law by the Anglo-Indian administration of justice after the establishment of British supremacy in this country. When we find that the punishment of 7 and 14 years' imprisonment for certain offences has

(1) See Lectures II—V.

been provided for by the Indian Penal Code and enquire into the causes why such punishment has been provided and why this ratio of 7 to 11 has been fixed, we find the rules of Mahomedan Criminal law, in a different garb, in the Penal Code—we find that according to Mahomedan criminal law mutilation was one of the proscribed forms of punishment. For some offences the loss of two limbs and for some loss of one limb had been proscribed—then we find Lord Cornwallis protesting against such barbarous punishment and changing the law and substituting 14 years imprisonment for loss of two limbs and 7 years for loss of one limb (1). When we find that the contracts of a certain particular class of women are to be thoroughly and critically examined by British Indian courts before being enforced, we find the condition of the people—the institution of *Purdah* system, affecting the general provisions of a British Indian Code. Thus in whatever code we find a saving clause saving usages and customs of the people, we find the condition of people affecting codification in this country. Then again in Adjective law when we find special provision being made for the examination of a certain class of females (examination on commission)—we find a code affected by the condition of the people and its provision made in conformity with the institutions of the country (2). Such is also the case when we find that the wages of labourers and domestic servants *whether payable in money or in kind*, can not be attached in execution in this country (3). All these peculiar features of the Anglo-Indian codes illustrate the physiognomy of the history of codification in British India (4).

Physiognomy of
history of
codification in
British India.

Then comes the important question whether further codification is feasible in this country. In answering such a question we must take the lessons from the history of codification in this country, as our guide. "The past" says Freeman (5) "is studied in vain, unless it gives us lessons for the present, the present will be very imperfectly understood, unless the light of the past is brought to bear upon it." And the solution of the question stated above can only be found if the lessons from the history of codification be taken as our guide.

Now what are the lessons to be derived from the

(1) See Lecture VIII.

(2) See Lecture III.

(3) Section 60 (1) (b) Civil Procedure Code (of 1908). See the Report of the Select Committee on the Civil Procedure Bill

(4) See Lectures VI, VII and VIII.

(5) Freeman's *Ottoman Power in Europe*. Preface IX.

Lessons from
history of
codification in
British India

history of codification in this country? That codification is the result of administrative exigencies and that portions of law have been touched by the Anglo-Indian codes. But administrative exigencies are not the only determining factors of codification of the law of a country, there are other considerations, considerations of the character, religions and customs of the people, grave political considerations for the legislators. That is why Warren Hastings and other early Anglo-Indian administrators took the line of least resistance in the matter and left the social fabric undisturbed as much as possible—that is why Lord Romilly remarked that no portion either of the Mahomedan or of the Hindu Law ought to be enacted as such in any form by a British legislature, and Lord Hobhouse, when he succeeded Sir James Stephen, received strong hints that it would be desirable to slacken the pace of the legislative machinery, and that is why a large portion of substantive civil law, though modified by “judicial legislation” is still uncodified in British India. It is a well-known fact that “no part of the law can be brought to perfection while the other parts remain crude” and that it is the accepted policy of Parliament (1) and of the Indian Government (2) that a complete code of substantive law is to be given to India, yet the administrative exigencies are not strong enough to override all other considerations and the work of codification has been suspended in British India. Suspension of the work of codification in India can only be justified by necessity, and on the question whether such necessity has arisen or not there is a good deal of difference of opinion. Sir C. P. Ilbert, Prof. Bryce and others think that such necessity has arisen, while Dr. Whitley Stokes, Sir Roland Wilson and others say that it has not, and that “to all appearance, the Indian Government has at last yielded to influences resembling those which pigeon-holed the Penal Code” for more than twenty years. On examining the causes which led to the suspension of the work of codification we find that the foundation on which the existing Anglo-Indian codes have been reared will not bear the codes of the personal laws of the people of the country—that the machinery which produced the existing codes cannot produce codes

Codification :
why suspended in
British India.

(1) Despatch from the Secretary of State for India to the Government of India dated 20th January, 1876

(2) Despatch from the Government of India to the Secretary of State for India dated 10th May, 1877

of Hindu and Mahomedan Law and that the legislative machinery has to be improved and re-adjusted for the production of such codes. The history of codification in Germany, Japan and Turkey not only points out the dangers and difficulties that are ahead of the Anglo-Indian jurists but also shows how to avoid and surmount them. To find out the causes which led to the scheme for giving codes to British India and how far the work of codification was desirable and practicable in the past,—to examine the principles on which codification is based in British India,—to see how the objections to codification have been met by the makers of the Anglo-Indian codes and what form the codes have taken,—to trace the causes which led to the suspension of the undertaking,—to find out how and to what extent those causes may be removed, whether it is practicable to codify the personal laws of the Hindus and Mahomedans and what are the conditions precedent which must be satisfied before further codification is attempted in this country—will be the subject of enquiry in the subsequent lectures in the following order —

- Lecture I.—The history of codification in British India.
- Lecture II.—The necessity of codification in British India
- Lecture III.—The influence of the condition of the people on codification in British India
- Lecture IV.—How the objections to codification have been met in British India.
- Lecture V.—The genesis, principles and form of the Anglo-Indian Codes.
- Lecture VI.—Progress of codification in British India
Substantive Law (public)
- Lecture VII.—Progress of codification in British India. Substantive (private) and Adjective Law
- Lecture VIII.—How far codification has touched Hindu and Mahomedan law
- Lecture IX.—Feasibility of further codification in British India.
- Lecture X.—Codification of customary law in British India
- Lecture XI.—Codification of the personal laws of the Hindus and Mahomedans
- Lecture XII.—Codification and probable classification of the personal laws of the Mahomedans and Hindus.

LECTURE I

HISTORY OF CODIFICATION IN BRITISH INDIA.

British India,
definition of.

For the definition of "British India" we must turn to the General Clauses Act, 1897, (1), and we find there that it "means all territories and places within Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor General of India or through any Governor, or other officer subordinate to the Governor General of India." This definition follows that given in the Interpretation Act of 1889 (52 & 53 Vic c 63 §18 (4)) which is merely an expansion of the definition given by the Indian General Clauses Act of 1868 (2) In 1858, the territories in the possession of or under the government of the East India Company and which were then held by the Company in trust for the Crown, became vested in Her Majesty (3) The Company, as is well-known to every student of history of this country, acquired different parts of India at different times But long before the Company possessed any territory or sovereign authority, its peculiar *status* made it necessary that the British Crown should grant the Company certain legislative authority to be exercised in its East Indian possessions, over its English servants and such native settlers as placed themselves under its protection Such grant of legislative authority was based on the theory "that wherever even a mere factory is founded in the eastern part of the world, European persons trading under the shelter and protection of those establishments, are conceived to take their national character from that Association under which they live and carry on their commerce" (4) According to this theory, any part of India wherever such a settlement or factory had been established, became British India, in the sense that the inhabitants of such a settlement or factory were governed by laws made by the British Chartered Companies.

(1) Act X of 1897 §3 (7).

(2) *Gazette of India*. Pt. V. February 6, 1897. p. 38.

(3) 21 & 22 Vic. c 106. §1.

(4) *The Indian Chief* (1800) 3 Rob. Ad. Rept. 12, 28, 29. Ilbert's *Government of India*, 2nd Ed pp. 251, 355 Cowell's *History and Constitution of the Courts and Legislative Authority in British India*. Ch I. Hansard's *Debates*. (1833) Third Series. Vol XIX. 506, 507.

Under these circumstances history of codification in British India may be divided into three periods viz.,

I From 1601 A.D to 1765 i.e. from the date of the Charter granted by Queen Elizabeth to the London East India Company to the time when the Dewanny authority over Bengal, Bchar and Orissa (1), was conferred in perpetuity on the East India Company by the Moghul Emperor

II From 1765 to 1833, the period of Regulation Law And

III From 1834 to the present time i.e. the period of partial codification in British India

In 1601 the Charter of Queen Elizabeth granted to the Governor and Company "or the more part of them being assembled," power to make, ordain and constitute such and so many reasonable laws, constitutions, orders, and ordinances, "as to them or the greater part of them being then and there present, shall seem necessary and convenient for the good government of the said Company and of all factors, masters, mariners and other officers employed or to be employed in any of their voyages, and for the better advancement and continuance of their trade and traffic," provided that they were not contray to the laws and statutes of England. They were also empowered to revoke and alter the same or any of them as occasion should require. The Charters granted by James I (1609) and Charles II (1661) contained similar provisions. The laws passed in pursuance of those provisions were directed to be published but no trace of them now exists. "They probably were for the most part concerned with the trade of the Company, preserving its monopoly and repressing interference. It is probable that the powers were not extensively used, but it was necessary that they should exist, in order to provide for any emergency that might arise (2).

First period
1601-1765.

Charter of 1601

Charters of
1609 and 1661

(1) Orissa then included the tract of country lying between the Rupnarayan and Suvarnarekha i.e. only a portion of Districts of Midnapur and Hughli. Orissa proper became a part of British India in 1803.

(2) Cowell's *History and Construction of the Courts and Legislative Authorities in British India*. p. 10, 2nd Ed. From the year 1600 when two ships from England to Bengal opened the trade of the London East India Company in this part of India, under a *firman* granted by Emperor Shah Jehan (See Orme Vol II p 8. It was obtained by Dr. Broughton, but it has been stated by some authority that this statement "is not supported by historical evidence and is probably incorrect". See *The Report on the Administration of Bengal, 1911-12*" p 38) until the year 1707 when Calcutta was declared a Presidency (see *Harington's Analysis* Vol. I Pt I Section I p. 2. But according to other authorities Calcutta was declared a Presidency in 1681) accountable only to the Directors in England, the Company's factories first at Hughly, afterwards in Calcutta,

L.E.C. I

Charter of 1698

Charter of 1726

Charter of 1753

East India Coy.
partially sovereign
body.

When the London East India Company and the English East India Company were amalgamated under the award of Lord Godolphin in the sixth year of Queen Anne's reign, all the early Charters were surrendered (1) and in the Charter granted by William III in 1698, which was the foundation of the United Company subsequently called the East India Company, nothing was said about the legislative power of the Company. But by the Charter granted in 1726 the Governors and Councils of the three Presidencies were empowered "to make, constitute and ordain bye-laws, rules and ordinances for the good government and regulation of the several corporations hereby created, and of the inhabitants of the several towns, places and factories aforesaid respectively and to impose reasonable pains and penalties upon all persons offending against the same or any of them" But such laws and penalties were to be reasonable and not contrary to the laws and Statutes of England and they were not to have any force or effect until the same had been approved and confirmed by order in writing of the Court of Directors This Charter (of 1726) also established or re-constituted the Mayor's Court in Calcutta, Bombay and Madras and expressly introduced the laws of England into the Presidency towns (2). The Charter of 1753 (26 Geo. II) also gave a similar power to the East India Company. Thus we see that even before 1757 the East India Company was not merely a trading corporation but also a partially sovereign body "It is a mistake to suppose that the East India Company were merely a commercial body till the middle of the eighteenth century Commerce was its object, but in order to enable it to pursue that object it had been invested from a very early period with political functions It was entrusted with the very highest prerogative of sovereignty. Its political functions at first attracted little notice, because they were merely auxiliary to its commercial functions. Soon how-

Sootanatty and Govindpur were subordinate to the Presidency of Madras. The first independent Governor of the English in Bengal was William (afterwards Sir William) Hedges, appointed in 1682, but recalled in 1684, when the Bay was again made subordinate to Fort St. George. In 1700 Bengal was made an independent Presidency and Sir Charles Eyre was appointed first President and Governor of Fort William in Bengal. *The Report on the Administration of Bengal, 1911-12.* The transactions of the Company were entirely commercial during this period.

(1) For the early Charters see *The Charters granted to the East India Company from 1601-1772* pp. 13, 41, 63, 368, 406

(2) *Ad General of Bengal vs Surnomoyee* (1863) 9 M I A. 426 *Bhoonee v. Natobee* (1901) 5 C W. N. 659 s.c. 28 C. 152 See also *Sukkan v. Bipad* (1906) 34 C. 48 s.c. 4 C L J 388.

ever they became more and more important. It is impossible to fix on any day or any one year, as the day or year when the Company became a great potentate. It has been the fashion to fix on the year 1765, the year in which the Company received from the Moghul Emperor a commission authorizing them to administer the revenue of Bengal, Behar and Orissa, as the precise date of their sovereignty, but long before 1765 the Company had the reality of political power. In fact it was considered both by Lord Clive and by Warren Hastings, as a point of policy to leave the character of the Company undefined in order that the English might treat the princes in whose name they governed—as realities or non-entities as might be most convenient” (1).

LEC I

Remarks of
Macaulay

But after the Battle of Buxar on the 23rd October, 1764 the Dewanny authority over the provinces of Bengal, Behar and Orissa was conferred in perpetuity on the East India Company by a *farman* in August, 1765. From this time the functions of Nazim as well as of Dewan were ostensibly exercised by the British Government and from this time begins the 2nd period of the history of codification in British India.

Grant of
Dewanny, 17652nd period
1765-1833

Although the civil and military power of the country, and the resources for maintaining it, were assumed on the part of the East India Company, it was not thought prudent, either by the local government, or the Directors, to vest the immediate management of the revenue or the administration of justice in the European servants of the Company. It may indeed appear doubtful whether the European servants, at this time, generally possessed sufficient knowledge of civil institutions and the state of the country to qualify them for the trust. A resident at the Nawab's Court, who inspected the management of the Naib Dewan, and the chief of Patna who superintended the collections of the province of Behar, under the immediate management of Shetab Roy, maintained an imperfect control over the civil administration of the Districts included in the Dewanny grant, while the Zemindary lands of Calcutta and the 24 Pergannahs and the ceded districts of Burdwan, Midnapur and Chittagong (ceded by Casim Aly Khan in 1760) were superintended by the covenanted servants of the Company (2). In the year 1760

Position of the
E. I. Coy

(1) Per Lord Macaulay *Hansard's Debates* (1833), Third Series Vol. XIX 506, 507

(2) See the 5th Report of the Select Committee of the House of Commons dated 28th July, 1812.

I., EC. I.

Apponiment of
Supervisors,
1769.

several of the Company's covenanted servants were deputed to act in subordination to the resident at the durbar, as local supervisors over the native officers employed in the collection of the revenues and *administration of justice*. It was their special duty "to ascertain in a minute, clear and comprehensive manner" 1st.—A short history of each district, from the time of Shooja Khan's Soobadary of Bengal (1720-1739) which was considered to be the "era of good order and good government." "You are to collect" runs the Letter of Instruction (1) "the form of the ancient constitution of the province, compared with the present; an account of its possessors or rulers, the order of their succession, the revolutions in their families, and their connections, the peculiar customs and privileges which they or their people have established and enjoyed; and, in short, every transaction which can serve to trace their origin and progress, or has produced any material changes in the affairs of the Province" 2ndly, The state, produce and capacity of the lands 3rdly, The amount of the revenues, the cesses or arbitrary taxes, and all demands whatever made on the ryot, by government or the Zemindar, with the manner of collecting them, and the gradual rise of every new impost 4thly, The nature and extent of the different manufactures, and what impositions were levied from the manufacturers, with other particulars required to be known for the regulation of commerce; and 5thly, Whatever might tend to obtain a knowledge of actual abuses and promote the reform of them in the administration of justice "It is difficult" runs the letter (2) "to determine whether the original customs or the degenerate manners of the Mussalmans have most contributed to confound the principles of right and wrong in these provinces Certain it is, that almost every decision of theirs is a corrupt bargain with the highest bidder The numerous offences, which are compromised by fines have left a great latitude for unjust determinations Trifling offenders, and even many condemned on fictitious accusations, are frequently loaded with heavy demands, and capital criminals are as often absolved by the venal judge. Your conduct in all capital offences should be to enforce justice where the law demands it, checking every

(1) Letter of Instructions from the Resident at the Durbar (Mr. Becher) to the Supervisors This letter was drafted by Mr Verelst See Colebrooke's *Supplement*, p. 174. Harington's *Analysis* Vol. II p. 4

(2) Colebrooke's *Supplement* pp. 177, 188.

composition by fine or mulct ; and where any disputes arise in matters of property, you should recommend the method of arbitration to any other ; and inculcate strongly in the minds of the people, that we are not desirous to augment our revenue by such impositions, but to *acquire their confidence by the equity and impartiality of our proceedings, and by our tenderness for their happiness.* The arbitrators should be men chosen by the parties themselves, and of known integrity, and whose circumstances may suppose them exempt from venality, and promise best to insure their rectitude. In capital crimes, the sentence should before execution, be referred to me, and by me to the ministers, that they may ultimately approve or mitigate it, according to the peculiarity of the case. You are farther to observe, that the want of regular registers of all causes and determinations has encouraged the natural propensity of the judge to bribery and fraud by making him easy with respect to any future prosecution on a rehearing of the cases which have been thus partially determined. Whereas, whilst a reference to records is always open, he must live in perpetual fear of detection. One of these registers should be lodged in the principal *cutchery* of the province, and an authenticated copy transmitted to Moorshidabad. As to suits on account of revenues, these will be much obviated in future by the happy consequences of our possessing a real, local, and undisguised knowledge of the country ; which we promise ourselves from the investigation above mentioned, and from your diligence and exactness in the performance of the several duties.

“For the ryot being eased and secured from all burthens and demands but what are imposed by the legal authority of Government itself, and future *Pottahs* being granted him, specifying that demand ; he should be taught that he is to regard the same as a sacred and inviolable pledge to him, that he is liable to no demands beyond their amount. There can, therefore, be no pretence for suits on that account. . . . Every man will know what he can

call and defend as his own ; and the spirit of lawless encroachment subsiding, for want of a field for exercise, will be changed into a spirit of industry , and content and security will take the place of continual alarms and vexations.

The instances where venal, ignorant and rapacious judges avail themselves of a crude and mercenary system of laws, of the prevalence of licentiousness, and the force of reigning habits and customs have been already

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Their duty.

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mentioned I can only repeat, that it is your part to endeavour to reform all these corruptions which have encroached on the primitive rights of both the Mahomedans and Hindus ; particularly by abolishing the arbitrary imposition of fines, and recommending, all in your power, the more equitable method of arbitration

Officers of justice
summond to
appear and
produce their
Sunnuds before
the Supervisors.

“The officers of justice, and Cazees, who are established by the Mahomedan law, as also the Brahmans, who administer justice among the Hindus, in every village, town, and quarter, should all be summoned to appear, produce their *Sunnuds* or authority for acting and register them. Records of whatever cases are heard and determined, are to be sent to, and deposited in the Sudder cutcherry of the province, and a monthly return thereof forwarded to Moorshidabad.

Register of
Sunnuds.

“The register of *Sunnuds* is intended to deter any from exercising a judicial, because lucrative function, who may not be legally appointed by Government, if a Mahomedan, or fairly elected by his caste, if a Hindu. And the depositing of all cases and determinations, added to the other Regulation, will figure to the several officers a vigorous and observant power, watching all their actions, and, in case of abuses, direct you at once to the culpable.

“The peculiar punishment of forfeiting castes, to which the Hindus are liable, is often inflicted from private pique and personal resentment amongst themselves, and requires to be restrained to those occasions only where there may be a regular process, and clear proofs of the offence before the Brahmans, who are their natural judges. But when any man has naturally forfeited his caste, you are to observe that he cannot be restored to it, without the sanction of Government ; which was a political supremacy reserved to themselves by the Mahomedan and which, as it publicly asserts the subordination of Hindus, who are so considerable a majority of subjects, ought not to be laid down ; though every indulgence and privilege of caste should be otherwise allowed them.”

The concluding exhortation of the letter runs as follows :—“Your commission entrusts you with the superintendence and charge of a province, whose rise and fall must considerably affect the public welfare of the whole. The exploring and eradicating numberless oppressions, which are as grievous to the poor, as they are injurious to the government ; the displaying of those national principles of honor, faith, rectitude, and humanity which should ever

characterise the name of an Englishman ; the impressing the lowest individual with these ideas, and raising the heart of the ryot from oppression and despondency to security and joy, are the valuable benefits which must result to our nation from a prudent and wise behaviour on your part. Versed as you are in the language, depend on none, where you yourself can possibly hear and determine. Let access to you be easy, and be careful of the conduct of your dependents. Aim at no undue influence yourself, and check it in all others. A great share of integrity, disinterestedness, assiduity, and watchfulness is necessary, not only for your own guidance, but as an example to all others ; for your activity and advice will be in vain unless confirmed by example. Carefully avoid all interested views by commerce, or otherwise, in the province, whilst on this service, for, though ever so fair and honest, it will awaken the attention of the designing, double the labour of developing stratagems, and of removing burthens and discouragements with which the commerce of the country in general has been loaded. You have before you a large field to establish both a national and private character ; lose not the opportunity which is to be temporary only, for your whole proceedings will be quickly revised : a test which the Board consider due to themselves, as a confirmation of the propriety of their choice ; to you, as an act of justice to your conduct ; and to the public, for the security of its interests. As the extent and importance of your trust are great, so in proportion will be the approbation or censure, arising from your good or ill conduct in it, be attended with unusual distinction or particular severity. Sentiments which I convey to you, to show the degree of confidence the Board repose in your integrity and abilities ; but by which I mean not the remotest suspicion, either in them or myself, of your disappointing their expectations" (1).

Letter of
Instructions to
the Supervisors.

Here we find the East India Company making laws for the people of Bengal not through legislature, but through their servants, the supervisors who acted as judges and were guided by the principles of equity. The reports made by the supervisors appointed in 1769 contain many important facts throwing light on the contemporary history of Bengal. Till 1772 every Zemin-daree, and every *talook*, was left to its own particular

(1) Colebrooke's *Supplement*. pp 188,189, Harington's *Analysis*, Vol. II. p 5.

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Just discernment
of the Collectors.

customs These indeed were not inviolably adhered to ; "the novelty of the business to those who were appointed to superintend it, the accidental exigencies of each district and not infrequently the just discernment of the Collector, occasioned many changes Referring to the administration of justice the President and Council remarked (1) "The administration of justice has so intimate a connection with the revenue, that we cannot omit the mention of it The security of private property is the greatest encouragement to industry, on which the wealth of every state depends The limitation of the powers annexed to the magistracy, the suppression of every usurpation of them by private authority and the facilitating of the access to justice, were the only means by which such a security could be obtained ; but this was impossible under the circumstances which had hitherto prevailed While the *Nizamut* and the *Dewanny* were in different hands, and all the rights of the former were admitted, the courts of justice, which were the sole province of the Nazim, though constituted for the general relief of the subjects, could receive no reformation The court and officers of the *Nizamut* were continued , but their efficacy was destroyed by the ruling influence of the *Dewanny*. The regular course of justice was everywhere suspended , but every man exercised it, who had the power of compelling others to submit to his decisions The people were oppressed ; they were discouraged, and disabled from improving the culture of their lands, and in proportion as they had the demands of individuals to gratify they were prevented from discharging what was legally due to the government "

About this time the President and Council under orders of the Directors, abolished the office of Naib-dewan and assumed openly the management of the dewanny, in the name of the Company. In executing the orders of the Directors the President and Council attempted to render the accounts of the revenue simple and intelligible , to establish fixed rules for the collections, to make the mode of them uniform in all parts of the Province, and to provide for an equal administration of justice (2). Soon after the receipt of orders from the Court of Directors, in 1772, to enter upon the duties of the dewanny office, a Committee of Circuit

(1) Remarks of the President and Council in a letter to the Court of Directors dated 3rd November, 1772

(2) See the Letter from the President and Council to the Court of Directors date 3rd November, 1772. Harington's *Analysis* Part I, p. 11.

was appointed consisting of the Governor (Warren Hastings) and four members of the Council. The Committee on the 15th August, 1772, proposed a Plan for the administration of justice, which on the 21st day of the same month was adopted by the Government. This Plan is generally known as the Plan of Warren Hastings. Colebrooke describes it as "General Regulation for the Administration of Justice, proposed by the Committee of Circuit at Cassimbazar, on the 15th August, 1772 and made and ordained by the President and Council in Bengal on the 21st August, 1772" (1). This regulation is really the first British Indian code, defective though it was in many respects. It has no preamble, but has extracts from a letter from the Committee of Circuit to the Council at Calcutta (2) attached to it, which explain the scheme of this Regulation. It consists of 37 Rules or Sections dealing with Civil and Criminal law, substantive and adjective. Under the provisions of this Regulation the *Mufussil Dewannee and Phoujdaree adalats* and two superior Courts of Justice, the Dewannee Sudder Adawlut and the Nizamut Sudder Adawlut were established at the chief seat of Government (3). It also provided that the disputes concerning the right of succession to Zamindarees and Talookdaries should be excluded from the jurisdiction of the Dewannee Adawlut and triable only by the President and Committee. But as to the law according to which the courts were to administer justice it was ordained "That in all suits regarding inheritance, marriage, caste and other religious usages or institutions the laws of the Koran with respect to Mahomedans, and those of the Shaster with respect to Gentoos, shall be invariably adhered to ; on all such occasions the Moulavis or Brahmans shall respectively attend, to expound the law ; and they sign the report and assist in passing the decree" (4). Thus we see that the personal laws of the Mahomedans and Hindus were left untouched. It was also ordained by this Regulation "that complaints, of so old a date as twelve years, shall not be actionable" (5). It contained a very important provision of substantive criminal law viz, that of punishment for dacoity (6). For the development of

L.R.C. I

Plan of Warren Hastings, 1772

(1) Colebrooke's *Supplement to the Digest of the Regulations and Laws*. (1807) p. 1.

(2) Letter dated at Cassimbazar, 15th August, 1772 containing an extract from the proceedings of the Circuit Committee dated the 28th June, 1772. Colebrooke's *Supplement*. pp. 8, 12

(3) R. R. I, 5. See Colebrooke's *Supplement*. pp. 1-8

(4) R. 23 Colebrooke's *Supplement* p. 5.

(5) R. 15. Colebrooke's *Supplement* p. 3

(6) R. 35 *Ibid.* p. 7.

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the law of procedure the last section of this Regulation laid down —“That, in addition to these general regulations, the Collector shall form such subsidiary ones, for promoting the due course of justice, and the welfare and prosperity of the Ryots, as the local circumstances of their respective districts, shall point out and require ; and that they shall report the same to the Committee of Circuit, in order to their being communicated to the Board for their final sanction and confirmation (1).

The Regulating
Act, 1773

Restriction of the
legislative power
of the Govern-
ment of India

Its removal
21 Geo. III.
c 70 §23

Judicial Regula-
tion of 11th April,
1780

The Regulating Act of 1773 (13 Geo III c.63) laid down specific rules and laws for the Government of Indian affairs Sections 36 and 37 of that Statute empowered the Governor General in Council to make and issue such Rules and Ordinances and Regulations for the good order and civil government of the United Company's settlement at Fort William in Bengal, and all places subordinate thereto as should be deemed just and reasonable and not repugnant to the laws of the realm ; and to enforce them by reasonable fines and forfeitures, provided however that such Regulations should not be valid unless registered in the Supreme Court of Judicature established under the said Statute In 1781 this restriction on the legislative power of the Government of India was partially removed by section 23 of the 21st Geo. III c 70 by which the Governor-General and Council were empowered to frame Regulations for the Provincial Courts and Councils, subject only to the executive Government of England Under the authority of these Statutes several Regulations were framed for the administration of justice and collection of revenue.

The Judicial Regulation of 11th April, 1780 was also passed to improve the administration of justice (2) In this Regulation the jurisdiction of Civil and Revenue Courts was demarcated for the first time (3)

(1) Rule 37. Colebrooke's *Supplement*, p. 7

(2) The preamble of this Regulation runs as follows —As several important changes have taken place in the constitution and Civil Government of these provinces, since the period when the late President and Council adopted their Plan for the administration of justice, and as these changes have not hitherto been provided for, in any general and uniform system ; the Governor-General and Council, therefore, after maturely and attentively considering the state of this country, with respect to its *present circumstances*, and the *manners and customs* of its inhabitants, have resolved that the following general plan and regulations shall now be established, for the more effectual and regular administration of justice in the country Civil Courts of these provinces Colebrooke's *Supplement*, p. 14

(3) But in 1787 in consequence of instructions from the Court of Directors, it was ordered that the offices of Judge and Collector in Moffusil (with the exception of the three Civil Courts in Moorshedabad, Patna and Dacca) should be united in the same person. But the law was again changed in 1793 by Regulation III of that

The increasing work of the Governor-General and Council having prevented their sitting in the Court of Sudder Dewanny Adawlut, a separate judge (Sir E. Impey) was on the 18th October, 1789, appointed to this court (1). On the 3rd November, 1789, thirteen articles of regulation—prepared by Sir E. Impey, were approved and passed for the guidance of the Civil Courts, superior and inferior, which were afterwards incorporated, with additions and amendments in a revised code, consisting of ninety-five articles or sections. This revised regulation was passed on the 5th July, 1781. This is really an amending and consolidating Regulation, amending and consolidating the rules of civil Procedure or in other words it is the earliest Civil Procedure Code of British India. This Regulation, drafted as it was by Sir E. Impey, bears the impress of the influence of the English Judge in §93, which provided “That in all cases, for which no specific directions are hereby given, the judge of the Sudder Dewannee Adawlut do act according to justice equity and good conscience” (2). This is really the very first attempt to codify the law of Civil Procedure in British India. It begins with a preamble, reciting amongst other things the following —“And whereas at different times, and under different circumstances of the courts of Mofussil Adawlut, and of the Sudder Dewannee Adawlut, diverse Rules, Ordinances and Regulations as occasion did require, were made and framed for the administration of justice many of which are not adopted to the state of the present courts for the *better ascertaining as well the powers, authority and jurisdiction of the said courts as the countries, districts and places over which the same do and shall extend* . . . and for the *explaining of such rules, orders and regulations, as may be ambiguous, and revoking such as may be repugnant or obsolete*; and to the end, that one consistent code be framed therefrom.

and that the inhabitants of these countries may not only know to what courts and on what occasions they may apply for justice, but, seeing the rules, ordinances and regulations, to which the Judges are by oath bound invariably to adhere, they may have confidence in the said courts. Be it resolved” Then follow 95 sections of this Regulation. Section 94 made the provision for making the

year Harrington's *Analysis* Vol I pp 33-41. Field's *Regulation*. p 140.

(1) Harrington's *Analysis* p. 30. Field's *Regulation* p 139.

(2) Colebrooke's *Supplement*, p 85. See Lec II for the application of the maxim of justice, equity and good conscience.

Lec I

Regulation of
5th July, 1781

Impey's Civil
Procedure Code

Lec. I.

Impey's Civil
Procedure Code

law of Civil Procedure cognoscible to the people of the country It enacted "that these rules, orders and Regulations be, on the next court day after the same shall be received in the courts of Mofussil Dewannee Adawlut, and in the Sudder Dewannee Adawlut, *openly read and published in such courts respectively* and be with all expedition truly and faithfully translated into the Bengal and Persian languages, and be either printed or written in a legible hand, and be affixed for the space of one month at least in same conspicuous part of the room in which such court shall respectively be held" (1). Section 95 of this Regulation, by annulling and revoking all previous "resolutions, rules, orders and regulations" which were in any way contrary and repugnant to the provisions of this Regulation, and by providing that the provisions of this Regulation "be and remain, in so much as the same shall not be hereafter altered, the only standing rules and regulations for the administration of justice in every court of Mofussil Dewannee Adawlut, and in the Sudder Dewannee Adawlut," made the law of Civil Procedure certain to some extent Besides these, several other regulations were passed (Judicial and Revenue) between 1772 and 1793 (2). But until the year 1793 no general code of regulation was enacted.

Russell's collec-
tion of Statutes.

The first collection of Statutes relating to the East India Company was compiled by Mr F. Russell of the Judicial Department of the Board of Control, published in 1786 and reprinted and subsequent Statutes added by Mr. Russel in 1793, both published in folio by the King's printers; the title is "A collection of Statutes concerning the incorporation, trade and commerce of the East India Company, and the Government of the British possession in India." It also contained the bye-laws of the Company and the Charters of the several East India Companies (3).

In 1793 the existing Regulations were collected by the Council which passed them as a revised Code. In 1793

(1) Impey's *Civil Procedure Code* (Regulation of 5th July, 1781) was printed at the Hon'ble Company's Press in 1781. A Persian translation of this Regulation by Mr Wilham Chambers was printed by Mr C Wilkins in 1782 Mr Duncan (afterwards the Governor of Bombay) translated this Regulation in Bengali in 1783 and it was printed with a re-impression of the original English in 1785.

(2) In 1787, as has been mentioned before (Reg of 11th April, 1780) the offices of Judge and Collector in Mofussil (with 3 exceptions) were united in the same person A revised code of Judicial Regulations, adopted to this change of system and dated the 27th June, 1787 was printed and published with translations in 91 articles. See Colebrooke's *Supplement* pp 93, 131, 253 Harington's *Analysis* Vol I p. 32.

(3) Smoult and Ryan's *Rules and Orders* (1839 Ed) Preface, XXIII.

the celebrated Regulation XLI of 1793 (A Regulation LEC. I. for forming into a regular Code all Regulations that may be enacted for the internal Government of the British territories in Bengal) inaugurated the system of Regulation Laws. In 1797 British Parliament by 37 Geo III c 142 recognized the authority of the Company to make a regular Code affecting the rights, persons and property of the natives of India and others amenable to the Provincial Courts. Section 8 of that Statute provided that such Regulations should be registered in the Judicial Department and framed into a regular Code, and printed with translations in the country languages. In 1800 A D Section 20 of 39 and 40 Geo. III. c.79 rendered the Province of Benares, all provinces or districts thereafter to be annexed or made subject to the Bengal Presidency, subject to such Regulations as the Governor General and Council of Fort William had framed or might thereafter frame. The Regulations of the Bengal Code passed from 1793 to 1834 inclusive numbered 675, but now reduced to only 83. Of these 48 are contained in Bengal Code, 7 in U. P. Code, 2 in the Punjab and N. W Code and 26 have not been republished.

Reg XLI of
1793.

Benares and
ceded Provinces.

Section 11 of 39 and 40 Geo. III c.79 empowered the Governor in Council at Fort St. George to frame Regulations for the Provincial Courts and Councils at that Presidency. Regulation I of 1802 (Madras), framed on the same line as the Bengal Regulation XLI of 1793, provided for the formation of a regular Code according to the plan adopted in Bengal. Up to 1834 two hundred and fifty-one (251) Regulations were passed by the Governor of Madras in Council. Of these only 29 are now wholly or in part, in force.

Madras.

The Company acquired the Island of Bombay not from the Moghul Emperor but from Charles II, to whom it was ceded by the King of Portugal as part of the marriage-dowry of the Infanta. The right to make Regulations was indirectly conferred on the Governor of Bombay, by 37 Geo III c 142. §11; but it was formally conferred in 1807 by 47 Geo. III. Sess. 2. c 68, §3 (1). Regulation I of 1799 (Bombay Based on the Bengal Regulation XLI of 1793) provided for the formation of a Code of Regulations (2)

Bombay.

(1) 47 Geo. III Sess. 2 c 68, passed "for the better government of the settlements of Fort St. George and Bombay" empowered the respective Governors in Council to make and issue such rules and regulations for the good order and civil government of the towns of Madras and Bombay and other factories subordinate thereto, and to add the necessary sanctions, as the Governor-General in Council might make for the good order and civil government of Fort William.

(2) In 1827 a Regulation, repealing all the 79 Regulations made up to that time, was passed by the Governor of Bombay in

LEC. I.

In 1813 the legislative powers conferred on the Provincial Councils were extended. Thereafter from time to time these powers were further developed and in pursuance of these powers the different provincial Councils, till 1834, framed and passed numerous regulations.

Subject-
matter of the
Regulations

The main subject of the Regulations was procedure and "current legislation," that is, such measures as were necessary to meet particular cases; but they also dealt with the substantive law to some extent. They established courts, civil and criminal, they dealt with their mode of proceeding; they laid down in minute details the manner in which the revenue was to be assessed and collected and provided for many subjects of minor and occasional interest. But as to the laws which the Courts thus established were to administer they were silent or rather spoke only in very vague and general terms. They provided that in certain cases Mahomedan law (1), in certain other cases the Hindu law, and in cases not especially provided for, the "law of justice, equity and good conscience" should be followed. They did not touch the personal law (substantive or adjective) of the Hindus and Mahomedans nor did they affect the laws of contracts and torts. One of the great disadvantages of the co-ordinate authority of the different provincial Councils was that the regulations passed by the different local governments were often in conflict with each other and there was much uncertainty of law in British India in this period. Many of the Regulations, passed before 1793, existed only in manuscript and although others were printed, and some translated into the native languages, still these were chiefly on detached papers, not easy of reference, even to the officers of the Government, and of course, difficult to be obtained in a collected form, whilst such as were not translated into the languages of the country were quite inaccessible to the natives of the country. On the 1st day of May 1793 no less than 48 Regulations were passed and from that date

Council Upto 1834, 259 Regulations were passed by the Governor of Bombay in Council. Of these only 19 are now, wholly or in part, in force.

(1) The Mahomedan criminal law was retained by Regulation IX of 1793, §§ 47, 50, 74, 75. It was only in 1832 by Regulation VI of that year (§5) that persons not professing the Mahomedan faith could claim the exemption from being tried under the law. It was finally done away with by the Penal Code in 1860. See *Ad. Gen. of Bengal vs. Surnomoyee* (1863) 9 Moo I.A. 208 per Sir James Colville. *Ilbert's Government of India*, 2nd Edition Page 32, *Hunter's Annals of Rural Bengal*, 6th Edition page 330. *Cowell's History of Courts and Legislative Authorities in India* 2nd Edition page 27

the number of Regulations increased every year. It was enacted that at the end of every year "a copious index to the Regulations" passed during the year should be prepared and bound up with them (1). It was further enacted "The Superintendent of the Company's press is to retain in his office one hundred copies of each of the Regulations that may be passed and printed annually, and the same number of copies of the translates of them in the Persian and the Bengal languages. At the close of the year, after he has been furnished with the index ordered to be prepared in the preceding section, he shall bind up the English printed copies of the regulations, and the Persian and the Bengal translates, each in separate volumes. The remainder of the English copies of the regulations and the Persian and Bengal translates, are to be distributed as they are passed and printed, in such proportions as the Governor General in Council may direct, amongst the courts of justice, the Board of Revenue and Trade, the Collectors of the land revenue and the customs, and the commercial residents and salt agents, or other public officers, or any individual to whom it may be thought advisable to deliver copies" (2). It was also provided that ten of the English copies of the regulations with the index should be sent to the court of Directors annually "by the two first ships that may be despatched for England after the volumes are completed. Five copies are to be sent in each of the two ships" (3). Not a single copy of these regulations printed at the Company's Press is available now to the public in this country.

The earliest publication containing these Regulations is the Digest of Regulations by Sir James Edward Colbrooke with a supplement. Its full title is *A Digest of the Regulations and Laws enacted by the Governor-General in Council for the civil government of the territories under the Presidency of Bengal, arranged in alphabetical order*, and it was printed and published in Calcutta in 1807. This digest contains the regulations dealing with civil, criminal and revenue laws of the country. The Judicial regulations begin from 1772 and the revenue regulations from 1769. The contents of the "Supplement" are (1) Judicial Regulations (1772-1806). (2) Regulations for criminal courts 1772-1800. (3) Revenue Regulations (1769-1806). (4) Coins and Mints. (5) Salt (6) Opium

Colbrooke's
Digest of
Regulations

(1) Reg. XLI of 1793, §X.
 (2) Reg. XLI of 1793, §XI.
 (3) Reg. XLI of 1793, §XII.

LEC. I. (only extracts of consultation and advertisements) (7) Customs. (8) Commercial Regulations (9) Invalidated Sepoys.

Harington's
Analysis

"An Elementary Analysis of the Laws and Regulations enacted by the Governor General in Council, at Fort William in Bengal, for the civil Government of the British territories under that Presidency" Pt. I (originally designed for the use of the students in the College of Fort William) by John Herbert Harington, President of the Council of Fort William College, was printed and published in Calcutta in 1805, on the eve of Lord Wellesley's departure from India and was dedicated to his Lordship. Volume I containing parts I & II was completed and published between 1805-1809. The second volume of the Analysis containing a portion of the 3rd part was printed at the Hon'ble Company's Press and published in Calcutta in 1814 and 1815. The third volume containing the last 8 sections of the third part and 4th, 5th & 6th part was printed at the Calcutta Gazette Press in 1817. A revised edition of the first volume with copious notes and additions was published in December 1821 in London (1).

Auber's Analysis.

Auber's Analysis of the constitution of the Company and of the laws passed by Parliament for the Government of their affairs at home and abroad was published in 1826.

White's Bengal
Regulations.

Mr. Henry White's edition of the *Bengal Regulations* in seven volumes contained the Regulations passed between 1793 and 1819.

Molony's Bengal
Regulations and
Molony's Synopsis

There was another edition (4 to) of these Regulations in 8 volumes by Mr. Molony but I have not got any trace of it. Mr. Molony also published a synopsis of the Regulations. This synopsis was afterwards published with the synopsis of Regulations published by the Baptist Mission Press, Calcutta.

Blunt and
Shakespear

An Abstract of the Regulations enacted for the Provinces of Bengal, Behar and Orissa in four (4to) volumes originally compiled by Mr. Blunt and continued by Mr. Shakespear was printed in Calcutta (1824-1828).

Dale's Index to
the Regulations,
1830.

Section 10 of Reg. XLI of 1793 and the corresponding enactment for the ceded Provinces, contained in the Regulations of 1803, provided that a copious index to the Regulations should be prepared every year, but as each of those indices was an index only to the Regulations of one year, it had consequently become necessary to consult many

(1) A Persian translation of Harington's *Analysis* was made by Major Ouseley and published in Calcutta in 1840.

volumes of them before the provisions on any subject could be ascertained from them ; while the possibility of uniting them into one General Index for the whole code, was precluded, by their having been constructed on a plan in which all subordinate heads were referred to a few principal ones, which varied in the indices of each year The valuable publications of Messrs Harington, Blunt, Shakespear and others did not supersede the necessity of a General Index To remove the inconvenience arising from the want of a general alphabetical index to the numerous Regulations enacted between 1793 and 1830 Mr. D. Dale, Judge and Magistrate of the city court of Moorshedabad, published his "*Alphabetical Index to the Regulations of Government for the whole of the territories under the Presidency of Fort William in Bengal.*" It was printed at the Baptist Mission Press, Calcutta in 1830

Mr Richard Clarke of the Madras Civil Service published *A concise Abstract of the Bengal Regulations from 1793-1831* which formed the sixth Appendix to the Minutes of evidence taken before the Judicial Sub-committee of the House of Commons in 1832 (1).

Richard Clarke

"*An Abstract of the civil judicial Regulations as enacted and published for the Provinces under the Presidency of Fort William,* containing a synopsis of the Actual Laws as in force on the 31st day of December, 1828 with reference to the circular Orders of the Sudder Dewannee Adawlut" by Augustus Prinsep of the Bengal Civil Service was printed at the Baptist Mission Press, Circular Road, Calcutta in 1829 (2)

Prinsep.

About this time the Baptist Mission Press, Calcutta, printed and published two editions of the *Bengal Regulations* (a) "The Regulations and Law enacted by the Governor General in Council for the Civil Government of the whole territories under the Presidency of Fort William in Bengal Eight volumes of the Regulations (1793-1828) were printed and published between 1827 and 1828 Subsequently the ninth volume was published and it contained the Regulations of 1829-1834. (b) *A Synopsis of Regulations,* arranged on the plan of Mr. Molony's Synopsis and divided

Baptist Mission Press Edition

(1) Mr. Clarke also published in 1853 the Bengal Regulations under the title "The Regulations of the Government of Fort William in Bengal in force at the end of 1853, to which are added, the Acts of the Government of India in force in that Presidency. With lists of Titles and an Index Prepared under the authority of the Hon'ble the Court of Directors of the East India Company" in 3 volumes Published in London.

(2) Prinsep's Abstract (continued from 1828-1843) was translated into Hindi by Moonshi Hosseinee. (4to), Delhi, 1843.

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into volumes according to subject Vols I, II, III contained all regulations referring to the Judicial Department. Vols IV-VI all those relating to the Revenue Department, vol. VII, those connected with customs, salt and opium; the Commercial and General Departments Vol. VIII contains Titles of Regulations and Indices to each year Regulations passed from 1793 down to the end of 1828, are the subject-matter of these 8 volumes.

III Period
1834 to the
present day.

In 1834 the legislative authority of the Provincial Governors was taken away and there was only one Legislative Council in British India from 1834 to 1861 The causes which led to the abolition of the provincial legislative councils of Bombay and Madras form a part of Physiology of history of codification and they will be dealt with under the heading "machinery for codification" in Lecture V. The enactments of the Legislative Council of the Governor-General are called Acts and not Regulations. After 1834 several editions of the Regulations passed during the regulation period (1793-1834) were published and they will be mentioned in this lecture in chronological order

Charter Act,
1833.

Now we shall notice the important changes introduced by the Charter Act of 1833 (3 & 4 W11 IV c.85) From the year 1813, as has been mentioned before, the legislative powers, conferred on the different Provincial Governments were, from time to time, extended and developed and in pursuance of those powers various laws and regulations were enacted But the Regulations passed by the different local governments instead of being homogeneous were often in conflict with each other, with the result that there was much uncertainty of law in British India during that period Uncertainty of law in British India was a serious defect in the Indian administration. At last provisions were made by the Charter Act of 1833 for the removal of this defect. Section 40 of that Statute provided for the appointment of a Law Member of the Council of the Governor General. He was to be appointed from amongst persons who were not servants of the East India Company, and he was not entitled to sit and vote in the said Council except at meetings for making Laws and Regulations Thos. Babington Macaulay (Lord Macaulay) was appointed the first Law Member (1) and he assumed the charge of his office on June 27, 1834. Section 53 of that Statute provided for the appointment of a Law Commission and from time to time commissions (the

Appointment of
Law Member and
Law Commissions

(1) *The Gazette of India, Supplement*, May 4, 1872 per Sir James Stephen.

number of the commissioners not to exceed five at any one time) to enquire fully "into the jurisdiction, powers, and rules of the existing courts of justice and police establishments in the said territories, and all existing forms of judicial procedure and into the nature and operation of all laws whether civil or criminal, written or customary, prevailing and in force in any part of the said territories" This section also provided that the commissioners should make reports, in which they should fully set forth the result of their enquiries. In pursuance of the authority thus conferred the First Indian Law Commission was appointed in 1834. This Commission consisting of Lord Macaulay, J. M. Macleod, G. W. Anderson ; and F Millet (the last three being Civil Servants of the Company representing Calcutta, Madras and Bombay Presidency) met in India in 1834 The members of this Commission, under the instructions of the local governments, employed themselves in the first instance in the preparation of a draft of a Penal Code They submitted their Draft Penal Code to Lord Auckland on 2nd May, 1837 On the 20th March, 1847 the President of the Council instructed the Law Commissioners to prepare a scheme of pleading and procedure with forms of indictment adapted to the provisions of the Penal Code ; such a scheme together with several forms was prepared by Messrs Cameron and Elliott and submitted with a report dated the 1st February, 1848.

LEC I.

First Law
Commission

Draft Penal Code

This Commission also recommended various changes in the procedure in civil suits and drafted a Code of Civil Procedure. In 1842 it prepared a draft code of the Law of Limitation in British India. Activity of the First Law Commission declined after Lord Macaulay's return to England and there was strong opposition to Macaulay's draft Penal Code by many of the Judges in British India.

Draft Civil
Procedure and
Limitation Bills.

While the draft codes prepared by the First Law Commission were being discussed the following Digests and Guides were published in India.

A Guide to the Civil Law of the Presidency of Fort William, containing all the unrepealed Regulations, Acts, Constructions and Circular Orders of Government relating to the subject was compiled by Mr Marshman in 1840 (1).

Marshman.

Mr. Fulwar Skipwith's *Magistrate's Guide*, which was an abridgement of the Criminal Regulations and Acts, contained the Circular Orders and Constructions of the

Skipwith.

(1) A Hindi translation of this work by the Professors of Delhi College was published in 1843. Mr. Marshman also published a Guide to the Revenue Regulations in the year 1835.

- LEG I. Court of Nizamut Adawlut in Bengal upto August, 1843.
- Campbell In the year 1840 Mr. A. D Campbell published in Madras *a Collection of the Regulations of the Madras Presidency* from the year 1802, with a Synopsis and Notes on the Code. This collection was republished in 1843, together with an enlarged Synopsis and a copious Index.
- Theobald First volume of Theobald's "*Acts of the Legislative Council of India*" containing the Acts and an Analytical Abstract appeared in 1844.
- Morley Soon after the publication of Theobald's book an *Analytical Digest of the reported cases decided by the Supreme Courts &c.* by Mr. W Morley was published in England In the Introduction Morley deals with the Law enacted by the Regulations and Acts of the Legislative Council of India (Introduction. p. cliv).
- Beaufort *A Digest of the Criminal Law of the Presidency of Fort William*, by Mr Beaufort, of the Bengal Civil Service, was published in Calcutta in 1846.
- Baynes In the year 1848 Mr Baynes, the Civil and Sessions Judge of Madura, published a treatise on the *Criminal Law of the Madras Presidency* This work contained also the Circular Orders of the Foujdary Adawlut from 1805 to February, 1848.
- Richard Clarke Mr. Richard Clarke published in 1848 an edition in 4to of the *Regulations of the Government of Fort St. George*, in force at the end of the year 1847, together with the Acts of Government in force at that Presidency.
- Fenwick. In 1849 Mr. Fenwick published at Calcutta an *Index to the Civil Law of the Presidency of Fort William* from 1793 to 1849 inclusive.
- Harrison Mr. Harrison of the Bombay Civil Service published a "*Code of Bombay Regulations*" in London in 1849.
- Sutherland. Sutherland's "*Regulations of the Bengal Code*" (1793-1834) was published in Calcutta in 1862.
- Field Field's "*Regulations of the Bengal Code*" was published in Calcutta in 1875
- The Second Indian Law Commission was appointed under the authority given by Charter Act of 1853 (16 & 17 Vic. c.95 §28) on Nov. 9, 1853. Its members were Sir John Romilly M R., Sir John Jervis, Sir Edward Ryan, Lord Sherbrooke (Mr. R. Low) and Mr. T. F. Ellis. Its duty was to examine and consider the recommendations of, and the enactments proposed by the First Law Commission, for the reform of the judicial establishments, judicial pro-

cedure and laws of India, and such other matters in relation to the reform of the said judicial establishments, judicial procedure and laws as might be referred to them for consideration. This Commission sat in London till the middle of 1856, examined and adopted the recommendations of the First Law Commission regarding the civil substantive law. After careful consideration this Commission reported "We have arrived at the conclusion that what India wants is a body of substantive civil law, in preparing which the law of England should be used as a basis, but which, once enacted, should itself be the law of India on the subject it embraced. The framing of such a body of law though a very arduous undertaking, would be less laborious than to make a digest of the law of England on those subjects, as it would not be necessary to go through the mass of reported decisions in which much of English law is contained. And such a body of law, prepared as it ought to be with a constant regard to the condition and institutions of India, and the character, religions and usages of the population, would, we are convinced, be of great benefit to that country. But it is our opinion that no portion either of the Mahomedan or of the Hindu law ought to be enacted as such in any form by a British Legislature." As to the defect in the state of the substantive civil law in India, and the expediency of framing and enacting a body of law for India based upon English law, this Commission supported the views of the First Law Commission. They presented four reports in which they submitted a plan for the amalgamation of the Supreme and Sudder Courts and an uniform code of civil and criminal procedure applicable both to the High Courts to be formed by that amalgamation and the inferior courts in British India. The recommendations of this Commission resulted in important legislation both in Parliament and in the Legislative Council of India. Macaulay's Penal Code was taken up and revised and was passed into law in 1860. A Code of Civil Procedure was passed in 1859 and a Code of Criminal Procedure in 1861. By the year 1861 India thus acquired a Penal Code and codes of Civil and Criminal Procedure. The draft of the Law of Limitation in British India by the First Law Commission was taken up and passed into law in 1859. (Act XIV of 1859)

LEC. I.

Second Commission, 1853

Its Reports.

One of the very earliest measures of Lord Lawrence and his colleagues, in the Punjab, was to provide themselves with Codes of laws which, if not so complete as the

LEC. I.

The Punjab
Civil Code

Penal Code, and the Codes of Procedure, were yet an immense improvement on the intricate systems which prevailed elsewhere in India. They had one set of rules collected together in a book called the "Principles of Law." It was prepared by Sir Richard Temple and afterwards it came to be known as the Punjab Civil Code. The first draft of the Punjab Civil Code was prepared as early as 1853, and many rules relating to Civil and Criminal Procedure were introduced somewhat later. This was an attempt, and an exceedingly able attempt, at codification, and anticipated corresponding attempts that had been made in other parts of India. This volume was sanctioned by the Government as a text book, and some portions of it relating to procedure acquired the force of law. But the Government of India had shrunk from the task of laying down a definite code for the Punjab. When leave to publish it as law was asked, the Government of India refused it and directed that it should be published with the authority attaching to the circulars of the Sadar Court.

In questions regarding inheritance, marriage, property of females, adoption, dower, &c the Punjab Courts administered the Mahomedan or Hindu law with certain modifications. These modifications were contained in the Punjab Civil Code, which, according to Sir James Stephen (1), "is an excellent work, but, having been drawn up by an officer (Sir Richard Temple), much engaged in other business and not at the time specially familiar with law, it has been found to give rise to a good deal of litigation and has been made the subject of many doubtful decisions." It has been swollen from a work of a few pages into one of those enormous receptacles of notes, comments, sections of Acts, and general observations, which pass in England under the name of legal text-books. But whatever might have been the defects of the Punjab Civil Code, it was a good text-book and the Punjab Laws Act of 1872 is based on this code.

The Third Law
Commission
1861.

In December, 1861 a fresh Commission was issued authorizing the Commissioners "to prepare for India a body of substantive law, in preparing which the law of England should be used as a basis." The Secretary of State for India requested the Commissioners that unless there was any objection to such a course, the result of their labours on one branch of civil law might be reported

(1) *Gazette of India. Supplement* 23rd September, 1871. p. 1293.

before they entered on the consideration of another branch, as the plan of successive reports on the various departments of law would greatly facilitate the necessary measures which must be taken in India, for giving effect to the recommendations of the Commissioners. Lord Romilly M R , Sir W. Erle C.J , Sir E. Ryan, Mr. R. Low, Mr. Justice Willes and Mr. John Macpherson Macleod were its original numbers. Afterwards Sir W. M. James I. J. succeeded Sir W. Earl and Mr. John Henderson succeeded Mr. Justice Willes and Mr. Justice Lush succeeded Mr. Henderson

LEC. I.

Its Members

This Commission submitted seven reports, six of which contained drafts of Rules of law to the successive Secretaries of State by whom they were transmitted to the Government of India with a view to legislation. These Commissioners did in the first instance direct their attention to the preparation of law of succession and inheritance generally applicable to all classes other than Hindus and Mahomedans, both of which have laws of their own on this subject. They submitted in their First Report a draft of the rules they recommended on this subject. These rules were introduced into the Legislative Council of the Governor-General of India on the 25th November, 1854 by Sir H. S. Maine as the "Indian Civil Code, Chapter I." On 3rd March, 1865 this title of the Bill was altered to "The Indian Succession Act of 1865." Sir H. S. Maine in proposing the alteration said "The Secretary of State, speaking apparently on behalf of the Law Commissioners has suggested that they may not wish this part of the Code to be its first Chapter. Now, nothing can be more capricious than the arrangement and classification adopted by existing systems of Jurisprudence and I can quite conceive a Code of laws which has a chapter on succession for its first chapter. But the Commissioners are of course entitled to settle the order of parts in the body of the Jurisprudence which they have prepared; and I can quite understand that they may wish at all events to place all their definitions at the beginning of their Code."

Its Reports.

The following are the other Reports of the Third Law Commission —

- 2nd Report (1866) containing draft Contract Bill.
- 3rd Report (1867) containing Draft Negotiable Instruments Bill.
- 4th Report (1867) did not contain any draft.
- 5th Report (1868) containing Draft Evidence Bill.

Lec. I.

6th Report (1870) containing Draft Transfer of Property Bill.

7th Report (1870) containing Revision of the Code of Criminal Procedure.

Legislative
activity in
British India

The Government of India after considering the provisions of these drafts thought it desirable to make certain material alterations in their provisions. Then the relation between the members of the Third Indian Law Commission and the Government of India became strained and ultimately the Commissioners resigned in 1870 (1). Besides the drafts mentioned above, the Commissioners also prepared a draft code of the Law of Insurance (Fire, Life and Marine).

Sir H S. Maine.
Sir James
Stephen.

In the meanwhile the Legislative Department of the Government of India under the guidance of Sir H. S. Maine and Sir James Stephen was busy codifying other branches of law. The Indian Companies Act was passed in 1866 (X of 1866). It was introduced by Sir H. S. Maine on the 22nd December, 1865 and was passed on the 9th March, 1866. Its object was to form a complete Code for the formation, regulation and winding up of Companies of every description, including under the term "Companies" any "association that chooses to avail itself of the provisions of the Act". It is a transcript of the English Companies Act, 1862, with the alterations, omissions and additions thought necessary to adapt that measure to India (2).

General Clauses
Act.

The first General Clauses Act was passed in 1868. Such a measure had long been contemplated in the Legislative Department of the Government of India, but had been delayed from various causes, among which had been the impression that a series of clauses, having the same object as that Act, might possibly be sent out by the Indian Law Commissioners. But after all the Act drafted in India was passed in 1868.

Divorce Act.

The Indian Divorce Act was passed in 1869 and in that year Sir James Stephen became the Law Member of the Council of the Governor-General of India. He held that office for about two years and a half during which time his attention was strongly directed, from the legislative point of view, to the subject of Criminal Law and particularly

(1) For the reasons why the Law Commissioners resigned see Whitley Stokes' *Anglo-Indian Codes*, Vol. I. p. 534. *Supplement to the Gazette of India*, May 4, 1872. pp. 528, 530.

(2) Stokes' *Companies Act*, p. 4. Act X of 1866 had been repealed by Act VI of 1882, which had been amended by Act VI of 1887; Act XII of 1891 and amended and supplemented by Act XII of 1895. All these Acts have been repealed by Act VII of 1913.

to its codification. Amongst other things he drafted and carried through the Legislative Council the Code of Criminal Procedure (Act X of 1872) (1), which with some alterations and variations had been re-enacted by Act X of 1882 which in its turn has been repealed by Act V of 1898

LEC. I.

During the time when Sir H. S. Maine and Sir James Stephen were in charge of the legislative portfolio (1862-72) the following, amongst other Acts, were passed by the Council of the Governor-General of India :—

Other Acts

- (1) The Religious Endowments Act XX of 1863.
- (2) The Official Trustees Act. XVII of 1864. (Repealed by Act II of 1913).
- (3) The Carriers Act. III of 1865.
- (4) The Indian Succession Act. X of 1865
- (5) The Parsi Marriage and Divorce Act. XV of 1865.
- (6) The Parsi Intestate Succession Act XXI of 1865.
- (7) The Native Convert's Marriage Dissolution Act. XXI of 1866.
- (8) The Indian Trustees Act XXVII of 1866.
- (9) The Trustees and Mortgagees Powers Act XXVIII of 1866.
- (10) The Public Gambling Act. III of 1867
- (11) The Press and Registration of Books Act XXV of 1867.
- (12) The Indian Divorce Act. IV of 1869
- (13) The Court Fees Act. VII of 1870
- (14) The Female Infanticide Prevention Act. VIII of 1870.
- (15) The Hindu Wills Act XXI of 1870.
- (16) The Indian Evidence Act. I of 1872.
- (17) The Special Marriage Act III of 1872
- (18) The Punjab Laws Act. IV of 1872.
- (19) The Indian Contract Act. IX of 1872.

When Lord Hobhouse (then Mr. Arthur Hobhouse) succeeded Sir James Stephen "considerable uneasiness had been caused both in England and in India by the rapidity and amount of recent Indian legislation, and Lord Hobhouse on his departure for India, received strong hints that it would be desirable to slacken the pace of the legislative machine. His own observation and experience after arrival in India satisfied him of the prudence of this advice" (2). After 1872 there had been, for sometime, very little codification in the true sense of the word. But Lord Hobhouse added to

(1) *History of the Criminal Law of England*. Vol I. p VI (1883 Ed.)

(2) Ilbert's *Legislative Methods and Forms*, p. 138.

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6th Report (1870) containing Draft Transfer of Property Bill.

7th Report (1870) containing Revision of the Code of Criminal Procedure.

Legislative
activity in
British India.

The Government of India after considering the provisions of these drafts thought it desirable to make certain material alterations in their provisions. Then the relation between the members of the Third Indian Law Commission and the Government of India became strained and ultimately the Commissioners resigned in 1870 (1). Besides the drafts mentioned above, the Commissioners also prepared a draft code of the Law of Insurance (Fire, Life and Marine).

Sir H. S. Maine
Sir James
Stephen.

In the meanwhile the Legislative Department of the Government of India under the guidance of Sir H. S. Maine and Sir James Stephen was busy codifying other branches of law. The Indian Companies Act was passed in 1866 (X of 1866). It was introduced by Sir H. S. Maine on the 22nd December, 1865 and was passed on the 9th March, 1866. Its object was to form a complete Code for the formation, regulation and winding up of Companies of every description, including under the term "Companies" any "association that chooses to avail itself of the provisions of the Act". It is a transcript of the English Companies Act, 1862, with the alterations, omissions and additions thought necessary to adapt that measure to India (2).

General Clauses
Act.

The first General Clauses Act was passed in 1868. Such a measure had long been contemplated in the Legislative Department of the Government of India, but had been delayed from various causes, among which had been the impression that a series of clauses, having the same object as that Act, might possibly be sent out by the Indian Law Commissioners. But after all the Act drafted in India was passed in 1868.

Divorce Act.

The Indian Divorce Act was passed in 1869 and in that year Sir James Stephen became the Law Member of the Council of the Governor-General of India. He held that office for about two years and a half during which time his attention was strongly directed, from the legislative point of view, to the subject of Criminal Law and particularly

(1) For the reasons why the Law Commissioners resigned see Whitley Stokes' *Anglo-Indian Codes*, Vol. I. p. 534. *Supplement to the Gazette of India*, May 4, 1872. pp. 528, 530.

(2) Stokes' *Companies Act*, p. 4. Act X of 1866 had been repealed by Act VI of 1882, which had been amended by Act VI of 1887; Act XII of 1891 and amended and supplemented by Act XIII of 1895. All these Acts have been repealed by Act VII of 1913.

to its codification. Amongst other things he drafted and carried through the Legislative Council the Code of Criminal Procedure (Act X of 1872) (1), which with some alterations and variations had been re-enacted by Act X of 1862 which in its turn has been repealed by Act V of 1895. LEC. I.

During the time when Sir H. S. Maine and Sir James Stephen were in charge of the legislative portfolio (1862-72) the following, amongst other Acts, were passed by the Council of the Governor-General of India:— Other Acts.

- (1) The Religious Endowments Act XX of 1863.
- (2) The Official Trustees Act XVII of 1864. (Repealed by Act II of 1913).
- (3) The Carriers Act. III of 1865
- (4) The Indian Succession Act. X of 1865.
- (5) The Parsi Marriage and Divorce Act. XV of 1865.
- (6) The Parsi Intestate Succession Act XXI of 1865
- (7) The Native Convert's Marriage Dissolution Act XXI of 1866.
- (8) The Indian Trustees Act. XXVII of 1866.
- (9) The Trustees and Mortgagees Powers Act. XXVIII of 1866.
- (10) The Public Gambling Act. III of 1867
- (11) The Press and Registration of Books Act XXV of 1867
- (12) The Indian Divorce Act IV of 1869.
- (13) The Court Fees Act VII of 1870
- (14) The Female Infanticide Prevention Act. VIII of 1870.
- (15) The Hindu Wills Act. XXI of 1870.
- (16) The Indian Evidence Act. I of 1872.
- (17) The Special Marriage Act III of 1872.
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(1) *History of the Criminal Law of England*. Vol I p. VI (1883 Ed.)

(2) *Ilbert's Legislative Methods and Forms*, p. 138.

L.E.C. I

Lord Hobhouse

the collection of codes an Act dealing with the law of Relief i.e. The specific Relief Act (I of 1877). During Lord Hobhouse's tenure of office the Legislative Department of the Government of India was busy consolidating the existing laws and repealing of such as had become obsolete. The Government of India endeavoured to prepare a Digest embodying the judicial law which had taken its place in our system. The procedure laid down by Sir James Stephen for the consolidation of current miscellaneous legislation "involved the double process of repealing obsolete statutes and of re-enacting in an amended and simplified form enactments in force." This double process was carried on with great activity during Lord Hobhouse's tenure of office, and its results were embodied in the (a) two volumes of English Statutes relating to India, (b) the three volumes of General Indian Acts; and (c) ten volumes of Provincial Codes viz, (i) The Lower Provinces Code, containing *first* the unrepealed Bengal Regulations in force in the Lower Provinces of the Presidency of Fort William, *secondly* all the unrepealed local Acts of Governor-General in Council in those provinces; *thirdly* the unrepealed Acts of the Lieutenant-Governor of Bengal in Council; *fourthly* Regulations for certain districts in Bengal made under 23 vic c 3 (ii) Bombay Code (iii) Madras Code (iv) The Punjab Code (v) Oudh Code. (vi) The Central Provinces Code (vii) N. W. P. Code (viii) Ajmere Code. (ix) Coorge Code (x) British Burma Code (1).

These publications embraced the whole of the unrepealed Indian Acts down to the respective dates of publication of these volumes. This was also the period of development of the "judiciary legislation" as shewn by the cases reported in the Law Reports of the different High Courts. Since 1870 the work of preparing as well as carrying through codifying Acts has mostly been done in this country and not in England.

In 1875 Lord Salisbury (the then Secretary of State for India) wrote to the Government of India (2) calling their attention to the fact that the statutory provision for the appointment of an Indian Law Commission had been designedly left in force by the Indian Councils Act and subsequent legislation and intimating his intention "to entrust to a small body of eminent draftsmen selected for the pur-

(1) For the present Provincial Codes see *infra*.

(2) Despatch from the Secretary of State for India to the Government of India, dated, 4th March, 1875.

pose, the task of preparing for the Legislative Council the remaining branches of the Indian Code." After some correspondence the Government of India proposed the codification of the following branches of substantive law viz., *Trusts, Easements, Alluvion and Diluvion, Master and Servant, Negotiable Instruments and Transfer of immovable Property* (1). It was also suggested in this despatch that codification of these branches of law should be carried out in India in the order mentioned in that despatch. The Secretary of State accepted these proposals of the Government of India (2), and Bills dealing with private trusts, Easements, Alluvion and Diluvion, and Master and Servant were drafted by Dr Whitley Stokes, and the Bills codifying the law of Negotiable Instruments and Transfer of Property were redrafted and remodelled.

On the 11th February, 1870 these bills were referred to a new Commission composed of Sir Charles Turner, sometimes the Chief Justice of Madras, Raymond West, one of the late Judges of the High Court at Bombay, and Dr Whitley Stokes. These Law Commissioners in their report dated the 15th November, 1870 made the following, amongst other recommendations —(a) That the process of codifying well-marked divisions of our substantive law should continue ; (b) that the eventual combination of those divisions as parts of a single and general Code should be borne in mind ; (c) that the English law should be made the basis in a great measure of our future Codes, but that its materials should be recast rather than adopted without modification ; (d) that in recasting those materials due regard should be had to Native habits and modes of thought ; that the form which those materials should assume, should, as far as possible, resemble that of rules already accepted ; that in other words, the propositions of our Codes should be broad, simple, and readily intelligible ; (e) that uniformity in legislation should be aimed at, but that special and local customs should be treated considerately ; (f) that the existing law of persons should not at present be expanded by way of codification, save that the operation of the European British Minors Act of 1874, should be extended ; (g) that the laws relating respectively to negotiable instruments, to the subjects dealt with by the Transfer of Property Bill, to Trusts, to Alluvion, to Easements, and Master and

LEC. I.
Fourth Law
Commission.

(1) Despatch from the Government of India to the Secretary of State for India dated, 10th May, 1877.

(2) Despatch from the Secretary of State for India to the Government of India dated, 9th August, 1877.

LEC. I.

Fourth Law
Commission

Servants, should be codified, and the Bills already prepared on these subjects be passed into law, subject to the amendments suggested in the report ; (h) that the law of actionable wrongs should then be codified ; (i) that concurrently with or after the framing of a law of actionable wrongs, the laws relating to insurance, carriers and lien should be codified ; (j) that the legislature should then deal with the law of property in its whole extent ; (k) that preparation be made for a systematic chapter on Interpretation (1)

In accordance with these recommendations the Council of the Governor-General passed the code dealing with Negotiable Instruments in 1881, and the codes relating to Trusts, Transfer of Property and Easements in 1882 In 1881 the Probate and Administration Act was passed by the Council of the Governor-General and in 1882 revised editions of the codes dealing with Companies, and Procedure (civil and criminal) were brought out.

Codification,
1882-1913.

After 1882 till the year 1912, there had been very little codification in British India and the Legislative Department of the Government of India had been busy with consolidating and amending the different branches of law in British India. All the important codes have been amended and consolidated The Code of Criminal Procedure has been revised and consolidated (V of 1898) The Code of Civil Procedure (Act V of 1908) and the Limitation Act (Act IX of 1908) have been passed The Penal Code has also been amended (XXVII of 1870 , XIX of 1872 ; X of 1873 §15 ; X of 1886 §§21-24 , XIV of 1887 §79 ; I of 1889 §9 ; IV of 1889 §3 ; IX of 1890 §149 ; X of 1891 §1 ; III of 1894 §§5-8 , III of 1895 §§1-4 ; VI of 1896 ; IV of 1898 , XII of 1899 §2 ; III of 1910) and several Indian Criminal Law Amendment Acts have been passed (X of 1886 ; X of 1891 ; III of 1894 ; III of 1895 , XIV of 1908) Some of the provisions of the Contract Act [The Indian Contract Act Amendment Act (VI of 1899)] and the Evidence Act (Indian Evidence Act Amendment Acts III of 1887, III of 1891 §§1-8; V of 1899; XVIII of 1872) have also been amended. Such is also the case with the Negotiable Instruments Act (Act II of 1885 , XII of 1891 , VI of 1897), Probate and Administration Act (Repealed in part by Act VII of 1889 , XII of 1891 ; Amending Acts VI of 1889 §§11-17 , II of 1890 §16 ; VIII of 1903 §3 ; IX of 1908) ; the Guardians and Wards Act (Act V of 1908 repealed §53. There are few other Acts

(1) Whitley Stokes' *The Anglo-Indian Codes*, Vol I. pp. XIX, XX.

affecting the operation of this Act in Burma and Central Provinces. The Transfer of Property Act (Act IV of 1882, amended by Act XV of 1895, Act II of 1900, Act VI of 1904 and Act V of 1908), the Indian Stamp Act (III of 1899; XV of 1904; V of 1906; VI of 1910). Since 1882 the General Clauses Act (Act X of 1897. Repealed in part by Act I of 1905, the Indian Universities Act (VIII of 1904, XI of 1911; the Indian Official Secrets Act (XV of 1889; Act V of 1904); Land Acquisition Act (I of 1894); Railways Act (IX of 1890 Rep. in part XIII of 1898; IX of 1896. Supplemented by Act IV of 1905), Post Office Act (VI of 1898 rep. in part XIII of 1898, II of 1903, III of 1912; Patents and Designs Act (Act II of 1911 repealed the Inventions and Designs Act of 1888, Act V of 1895); the Army Act (VIII of 1911. Repealed the Acts mentioned in its Schedule; Factories Act (XII of 1911 repealed Act XV of 1881, XI of 1891); Lunacy Act (IV of 1912); and the Indian Companies Act (VII of 1913), have been amended.

Sec. I

Legislative
activity
1882-1917.

New interests and new circumstances which have arisen in the progress of society have made the passing of several new Acts necessary. To encourage thrift, self-help and co-operation among agriculturists, artisans and persons of limited means, and for that purpose to provide for the constitution and control of co-operative credit societies the Co-operative Credit Societies Act (X of 1903) was passed and, in 1912, further to facilitate the formation of co-operative societies for the promotion of thrift and self-help among the people mentioned above and to amend the law relating to Co-operative Societies, the Co-operative Societies Act 1912 (II of 1912) was passed.

Co-operative
Societies Act,
1912.

With the use of electrical energy for lighting and other purposes, legislation on the subject had been pressed upon the Government of India from various quarters and by the Governments of Bombay and Bengal in particular. In 1903 an Act, to make better provision for facilitating and regulating the supply and use of electrical energy for lighting and other purposes, was passed. At the time of the passing of the Act it was anticipated that amending legislation would be called for at an early date. Having regard to the experience gained in the practical working of the Act, the Government of India in 1907 referred various difficulties which had arisen in its working to a committee on which electro-technical and commercial interests were represented and after due deliberation Act

Electricity Act.

LIFE I.

IX of 1910, repealing the Act of 1903, was passed

In 1911 the Indian Factories Act (XII of 1911) was passed which repealed Acts XV of 1881 and XI of 1891

Lunacy Act
Provident Insur-
ance Societies

In 1912 the Lunacy Act (IV of 1912), the Provident Insurance Societies Act (V of 1912), the Indian Life Assurance Companies Act (VI of 1912) were passed (1)

All the general Acts of the Legislative Council of the Governor-General of India (1834-1908) have been published in a revised edition of the unrepealed Acts of the Council of Governor-General of India in six volumes. Volume No. 6 also contains 5 Acts of 1909. The Local Acts of the Council of the Governor-General and of the different Provincial Legislatures have been published in the Local Codes.

Conclusion

In this lecture, dealing as it does with the anatomy of history of codification, we have noticed the important landmarks in the history of codification in British India. In this lecture we have seen that Hastings' Plan of 1772 shaped the course of subsequent history of codification, by reserving their personal laws to the Hindus and Mahomedans—that in 1793 provisions were made for the compilation of Regulation Codes in Bengal—that subsequently those provisions were extended to Bombay and Madras—that the Regulations passed by the local governments, instead of removing the confusion and uncertainty of law, made confusion worse confounded—that to remove the defect of uncertainty and confusion of law, different Law Commissions were appointed to prepare Anglo-Indian Codes and thus to help the cause of codification in British India—that the work of codification was suspended, for some reason or other, for some time and that within the last few years a few codifying Acts have been passed. Now we shall deal with the causes which led Warren Hastings to take the line of least resistance and see why it was necessary to frame and pass the Regulation codes—how the Regulation codes are related to the subsequent codifying Acts—why the work of codification was suspended. These considerations are the subject-matter of physiology of history of codification and we shall deal with them in our next lecture "Necessity for Codification in British India."

(1) See Lec VI Progress of Codification in British India.

LECTURE II

NECESSITY OF CODIFICATION IN BRITISH INDIA.

"It is essential to the future prosperity of the British territories in Bengal, that all Regulations which may be passed by Government affecting in any respect the rights, persons or property of their subjects, should be formed into a regular Code, and printed with translations in the country languages; that the grounds on which each regulation may be enacted should be prefixed to it, and the Courts of Justice should be bound to regulate their decisions by rules and ordinances which those Regulations may contain. A Code of Regulations framed upon the above principles will enable individuals to render themselves acquainted with the laws upon which the security of the many inestimable privileges and immunities granted to them by the British Government depends, and the mode of obtaining speedy redress against every infringement of them, the Courts of Justice will be able to apply the Regulations according to their true intent and import, future administrations will have the means of judging how far the Regulations have been productive of the desired effect, and, when necessary, to modify or alter them as from experience may be found advisable, new Regulations will not be made, nor those which may exist be repealed, without due deliberation; and the causes of the future decline or prosperity of these Provinces will always be traceable in the Code to their source." Thus runs the preamble of Regulation XII of 1793 (1). Here we find the reasons why the Acts, etc. passed by the Government should be formed into a regular Code, viz., (a) such a Code will enable individuals to render themselves acquainted with the laws upon which the security of the many inestimable privileges and immunities granted to them by the British Government depends, and the mode of obtaining speedy redress against every infringement of them, (b) it will enable the Courts of Justice to apply the Acts, etc. according to their true intent and import, or in other words to make the laws of the country

(1): "A Regulation for forming into a regular Code all Regulations that may be enacted for the internal Government of the British Territories in Bengal—Passed by the Governor-General in Council on the 18th May, 1793."

Lec II.

cognoscible both to the Administrators of Justice and the people of the country

Prior to 1793 the territorial possessions of the East India Company were without a general Code of British Laws and Regulations. Many Rules, Orders and Regulations were indeed passed by successive Governments for the administration of justice, the collection of revenue and other objects. "Some of these Regulations and Rules had been printed with translations in the country languages but others remained in manuscript, and those printed were, for the most part, on detached papers; without any prescribed form, or order, and consequently not easily referred to, even by the officers of Government, much less by the people at large, who had no means of procuring them in a collective state; or of becoming acquainted with such of them as had not been promulgated in the current languages" (1).

Reg. XLI of 1793
37 Geo III c 142
Legislative
authority of the
Governor-General

The preamble of Regulation XLI of 1793 was adopted by 37 Geo III c CXLII, passed on the 20th July 1797, which gave express sanction of Parliament to the exercise of legislative authority by the Governor-General in this Presidency.

By the enactment of Regulation XLI of 1793 and by the institution of Civil and Criminal Courts of Justice, to be guided by the Regulations framed and published in conformity with the provisions of Regulation XLI of 1793, the Government of the country went far towards attaining the object, which in all countries is recognised to be of fundamental importance, viz, the protection of the person and property of the subjects.

We have noticed in the first lecture how and when legislative authority was conferred on the Governors in Council of Bombay and Madras and how the Province of Benares and the ceded districts were brought under the jurisdiction of the Governor of Bengal (2). We have also noticed the gradual development of the legislative power of the Governors of Bombay and Madras and the passing of numerous Regulations by the Governors of those Presidencies.

That the Regulations did make the law cognoscible is

(1) Harnington's *Analysis* Pt I. p. 2. (1805 Ed.).

(2) Regulation XLI of 1793 was extended to the Province of Benares by Reg. I of 1795 §4 and re-enacted for the ceded provinces by Reg. I of 1803. The ceded provinces included the territories ceded to the E. I. Coy. by the Nawab Vazeer on 10th Nov., 1801, by the Peshwa to the Company on 16th Dec., 1803; and by Doulut Rao Scindhia on 30th December, 1803.

evident from the answers given by the Judges and Magistrates to the interrogatories dated the 25th October, 1801, circulated by Lord Wellesley. Two of the questions were—No. 10.—Do the *Fakeels* in general discharge their duty to their clients, with honour and fidelity? LIC II.

No. 11.—Are the principal inhabitants of your jurisdiction as well acquainted, as individuals in general can be supposed to be informed of the laws of the country? Two questions.

The replies of Moorshedabad Court of Appeal and Circuit were (1) —“The *Fakeels* attached to our Court do, in general appear to us to discharge their duty to their clients, with honour and fidelity.” Replies thereto
(1) From Moorshedabad Court of appeal and Circuit

Answer No. 11.—“If by the laws of the country be meant the Koran and Shaster, the principal inhabitants of our jurisdiction are well acquainted with the Codes of their respective religions, as individuals in general can be supposed to be informed. If the Regulations of Government be also meant we believe that they are known to few, except the *Fakeels* and ministerial officers of the Courts, and some principal land-holders.”

The replies of the Judge and Magistrate of Midnapur were (2) — 2 Judge and Magistrate of Midnapur

Answer No. 10.—“The *Fakeels* in general discharge their duty with honour and fidelity. I have seen instances of negligence, but none of treachery to their clients.”

Answer No. 11.—“None but public officers, the pleaders and those who are candidates for office, can be said to possess a general knowledge of the Regulations. The zemindars, tolookdars, and farmers, and the merchants know such Regulations as concern them respectively. The one, the revenue laws relating to the collections, attachments &c ; the other, the commercial regulations respecting duties, rate of interest &c ; and among men of business, this knowledge of the regulations immediately relating to their particular occupations, is no doubt increasing.”

The Judge and Magistrate of Burdwan replied (3) — 3 Judge and Magistrate of Burdwan.
Answer No. 10.—“I have had no complaint made against them by their clients ; but have before observed that, in many instances, an indifference is shown by them, in regard to the issue of the suits upon which they are employ-

(1) Dated 25th January, 1802. *The Fifth Report from the Select Committee on the affairs of the East India Company*, p. 672 (Madras Edition published in 1865).

(2) From H. Strachey, Judge and Magistrate of Midnapur. Dated 30th January, 1802. *The Fifth Report*, pp. 680, 683.

(3) *The Fifth Report* p. 717.

LEC II.

ed ; and I am afraid that they do not always discharge their duty with honour and fidelity."

Answer No. 11 — "I have found some zemindars and principal farmers and merchants, tolerably well acquainted with those laws which chiefly concern them, but few seek the information ; and from this cause I am afraid that the knowledge of the regulations is much confined to the sudder station "

From the replies of the District Officers quoted above it is clear that the *Vakeels* in the Muffasil were generally well acquainted with the regulations; otherwise they would not have been able to discharge their duty towards their clients with honour, and fidelity. Apart from the *Vakeels*, other classes e g zemindars, merchants and ministerial officers of the Courts had some degree of knowledge of the contents of the Regulations. It may be said in this connection that they knew such Regulations only as concerned them and that having regard to this limitation of their knowledge, the object of codification viz , to make laws cognoscible, was not attained. This argument may be best refuted by what Prof Sidgwick has said on this point ; he has said (1) "It is only a minute fraction of the legal code of his country, varying according to the nature of his calling and his social position, that it would practically profit an ordinary citizen to know for the ordinary business of his life. It is, therefore expedient to facilitate the acquirement by an ordinary citizen of such knowledge of the law of his state as practically concerns him." This is exactly what the early Regulations did for the zemindars and merchants and it can be safely stated that those Regulations did attain their object to a great extent. I say to a great extent because in spite of the efforts of the early British administrators of this country to have codes they were not successful in their attempt and uncertainty of law continued. To ascertain the causes which made the task of the early administrators so difficult we should examine the causes leading to uncertainty of law in British India.

(B) To remove uncertainty of law.

The law of the country when the English first came to India consisted of—*first*, a large and elaborate system of Inheritance and Family Law ; Mahomedan law fairly uniform throughout India, though in some parts of the country modified by Hindu customs ; but Hindu law less uniform. Mahomedan law was contained in treatises which were posterior to the Koran and consisted of commentaries upon

(1) *Elements of Politics*. 2nd Ed. p 339.

that book and upon the traditions that had grown up round it. Much of Hindu law was contained in treatises very ancient and credited with divine origin, but a portion of it was contained in the commentaries of later day Hindu commentators (1). *Secondly*, a large mass of customs relating to the occupation and use of land and of various rights connected with tillage and pasturage, including water-rights, rights of soil, accretion on the banks of rivers, and forest rights. The agricultural system and revenue system of the country rested upon these land customs, which were mostly unwritten and which varied widely in different districts. *Thirdly*, a body of customs, comparatively scanty and undeveloped, but still important, relating to the transfer and pledging of property and to contracts, especially commercial contracts. *Fourthly*, certain penal rules drawn from Mahomedan law and more or less enforced by Mahomedan princes.

LEC II.

Causes of
uncertainty of law

Thus there were considerable branches of law practically non-existent. There was hardly any law of Civil and Criminal Procedure, because the methods of justice were primitive. There was very little of the law of torts, and in the law of property, of contracts and of crimes, some departments were wanting or in a rudimentary condition. There was no law relating to public and constitutional rights, because such rights did not exist (2).

It has already been mentioned that Rule XXIII of Hastings' Plan directed that "in all suits regarding inheritance, marriage, caste, and other religious usages and institutions, the laws of the Koran with respect to the Mahomedans and those of *Shaster* with respect to Gentoo shall be invariably adhered to." But this direction did not remove the uncertainty of law on these subjects simply because there were different Schools of Hindu and Mahomedan law containing conflicting provisions. The early English administrators, not knowing Arabic and Sanskrit, had to get the advice of Kazis and Pandits who scarcely followed one particular method of interpretation

1st Cause of
uncertainty
Different Schools
of Hindu and
Mahomedan Law.

(1) *Nanda Pandit* (Circ. 1633), *Kamalakar* (Circ. 1612), *Ballam Bhatta* (middle of the 17th century A.D.) *Sikrishna Tarkalankar* flourished in the early part of the 18th century. See Sarvadhikary's *Hindu Law of Inheritance* Lec. VIII. *Nikantha's* works came into general use about the year 1700 A.D. See West and Buhler's *Hindu Law*, 3rd Ed. Introduction p. 20. *Mandalik's Vyavahara Mayukha*, p. lxxv.

(2) Bryce's *Studies in History and Jurisprudence*. Vol. I p. 120

LĒC. II.

Sir William
Jones.

“The principle of decision” says Sir William Jones (1) “between the native parties in a cause, appears perfectly clear, but the difficulty lies in the application of the principle to practice ; for the Hindu and Mahomedan laws are locked up for the most part in two very difficult languages Sanskrit and Arabic, which few Europeans will ever learn, because neither of them leads to any advantage in worldly pursuits ; and if we give judgment only from the opinions of the native lawyers and scholars, we can never be sure, that we have not been deceived by them It would be absurd and unjust to pass an indiscriminate censure on so considerable a body of men, but my experience justifies me in declaring, that I could not with an easy conscience concur in a decision merely on the written opinion of native lawyers, in any cause in which they could have the remotest interest in misleading the Court ; nor, how vigilant soever we might be, would it be very difficult for them to mislead us, for a single obscure text, *explained by themselves*, might be quoted as *express authority*, though perhaps, in the very book from which it was selected, it might be differently explained, or introduced only for the purpose of being exploded.”

Sir William Jones got a copy of Halhed’s Gentoo Code attested by the Court Pundit of the Supreme Court, as good law. “I made the Pundit of our Court” says Sir William Jones (2) “read and correct a copy of Halhead’s book in the original Sanskrit and I then obliged him to attest it as good law, so that he never now can give corrupt opinions without certain detection ”

“Even if there was no suspicion of corruption on the part of the interpreters of the law, the science which they profess is in such a state of confusion that no reliance can be placed on their answers” (3)

Thus the questions relating to the personal laws of the Hindus and Mahomedans were answered differently by different Judges helped by Kazis and Pundits, the result of such conflicting decisions was uncertainty of law

Then again there were certain branches of law not dealt with by the Hindu and Mahomedan law-givers, and there were also certain questions of law on which they were silent

(1) *Letter from Sir William Jones to Lord Cornwallis*, March 19, 1788. *Lord Teignmouth’s Memoirs of Sir William Jones*, pp. 306-312. See also Sir F. Macnaghten’s “*Considerations on the Hindu Law*” Preface p. IX.

(2) *Lord Teignmouth’s Memoirs of Sir William Jones* p 277

(3) *Hansard’s Debates*. Third Series, Vol. XIX 533.

In such cases also the early administrators did not like to remove the defects by legislation and directed that such cases should be decided according to justice, equity and good conscience (1). This direction instead of minimising the evils of uncertainty of law increased it, and brought in the evil effects of Judge-made laws.

LEC. II.

and Cause.
Application of
maxim of justice
equity and good
conscience

“While the judicial system of British India” says Lord Macaulay (2) “continues to be what it now is, these decisions (of different courts of justice) will render the law not only bulky, but uncertain and contradictory. There are at present eight Chief Courts subject to the legislative power of your Lordship in Council, four established by Royal Charter, and four which derive their authority from the Company. Every one of these tribunals is perfectly independent of the others. Every one of them is at liberty to put its own construction on the law; and it is not to be expected that they will always adopt the same construction. Under so inconvenient a system there will inevitably be, in the course of a few years, a large collection of decisions diametrically opposed to each other, and all of equal authority”

3rd Cause.
Existence of
different tribunals
independent of
each other.

Then, there were five different bodies of Statute-law in force in British India. (a) The English Statute-law as it existed in 1726, introduced at least in the Presidency Towns by the Charter of Geo I. (b) English Statute-law subsequent to 1726 which was expressly extended to any part of India. (c) The Regulations of the Governor-General's Council, commencing with the Revised Code of 1793 down to 1834. These Regulations were in force in the territories within the Presidency of Bengal. (d) The Regulations of the Council of the Governor of Madras from 1802 to 1834 which were in force in the Presidency of St. George (e) The Regulations of the Bombay Code from 1799 to 1834 in force in the Presidency of Fort St. David (3).

4th Cause.
Existence of
different Statute
laws.

We can examine the subject of uncertainty of law in this country between 1773 and 1833 from another standpoint of view viz., by examining the state of any particular branch of law during that period. Let us consider the condition of criminal law first. “The Criminal Law of the Hindus” says Lord Macaulay (4) “was long ago superseded, through the greater part of the territories now subject to the

Uncertainty of law

(1) For the Regulations laying down this rule see supra.
(2) Letter to Lord Auckland dated the 14th October, 1837.
(3) See Morley's *Digest*. Introduction, pp. clix, clx. Cowell's *Courts and Legislative Authorities in India*. 5th Ed. pp. 67, 68.
(4) Letter to Lord Auckland dated the 14th October, 1837

I, EC II.

1. Criminal law

Company, by that of the Mahomedans . The Mahomedan Criminal law has in its turn been superseded, to a great extent, by the British Regulations. Indeed, in the territories subject to the Presidency of Bombay, the Criminal law of the Mahomedans as well as that of the Hindus, has been altogether discarded, except in one particular class of cases, and even in such cases, it is not imperative on the judge to pay any attention to it The British Regulations, having been made by three different legislatures, contain very different provisions Thus in Bengal serious forgeries are punishable with imprisonment for a term double of the term fixed for perjury (1); in the Bombay Presidency, on the contrary, perjury is punishable with imprisonment for a term double of the term fixed for the most aggravated forgeries (2); in the Madras Presidency the two offences are exactly on the same footing (3). In the Bombay Presidency the escape of a convict is punished with imprisonment for a term double of the term assigned to that offence in the two other Presidencies (4), while a coiner is punished with little more than half the imprisonment assigned to his offence in the other two Presidencies (5) In Bengal the purchasing of regimental necessaries for soldiers is not punishable, except in Calcutta, and is there punishable with a fine of fifty rupees (6). In the Madras Presidency it is punishable with a fine of forty rupees (7) In Bengal the vending of stamps without a license is punishable with a moderate fine; and the purchasing of stamps from a person not licensed to sell is not punished at all (8). In the Madras Presidency the vendor is punished with a short imprisonment; but there also the purchaser is not punished at all (9) In the Bombay Presidency, both the vendor and purchaser are liable to imprisonment for five years, and to flogging" (10)

So widely did the systems of penal law established in British India differ from each other in the first half of the nineteenth century that the First Law Commission could

(1) Ben Reg XVII of 1817, Section IX.

(2) Bom Reg XIV of 1827, Sections XVI and XVII

(3) Mad Reg VI of 1811 Sec III.

(4) Bom. Reg. XIV of 1827 Sec XXIV and Reg V of 1831 Sec I. Ben. Reg XII of 1818 Sec V. cl. I Mad Reg. VI of 1822 Sec V cl 2

(5) Bom Reg XIV of 1827 Sec XVIII Ben Reg XVII of 1817, Sec. IX. Mad Reg II of 1822, Sec. V

(6) Calcutta Rule, Ordinance and Regulations passed 21st August, registered 13th November, 1821.

(7) Madras Regulation XIV of 1832, Section II, cl. 1.

(8) Bengal Regulation X of 1829, Section IX, cl 2.

(9) Madras Regulation XIII of 1816, Section X, cl. 10.

(10) Bombay Regulation XVIII of 1827, Section IX, cl 1.

not recommend any of the three systems mentioned above as furnishing even the rudiments of a good code. The Criminal Law of Bengal and Madras Presidencies was in fact Mahomedan law, which had gradually been altered to such an extent as to deprive it of all title to the religious veneration of Mahomedans, yet which retained enough of its original peculiarities to perplex and encumber the administration of justice. The penal law of Bombay Presidency was all contained in one regulation (Bom. Reg. XIV of 1827) L.F.C. II.

Such was the state of penal law in this country outside the Presidency Towns. The population which lived within the local jurisdiction of the Courts established by the Royal Charters was subject to the English Common Law, that is to say to a system which was framed without the smallest reference to India, to a system which even in the country for which it was framed, was generally considered as requiring extensive reform.

On this subject also "the law was in a state of great uncertainty" before the passing of the Indian Evidence Act (1) In the Presidency Towns the English rules of evidence, as were contained in the Common and Statute law which prevailed in England before 1726, were introduced by the Charter of that year. There were also some other rules "to be found in subsequent Statutes, and expressly extended to India; while others again, had no greater authority than that of use and custom" (2) The English law of evidence was never extended by any Regulation of Government to criminal trials in the Mofussil (3) Though the courts in the Mofussil were not required to follow English law as such, yet there was nothing to prevent them from following it when they regarded it as the most equitable. In addition to a few rules "expressly prescribed by the regulations between 1793 and 1834 a vague customary law of evidence, partly drawn from the Hedaya and the Mahomedan law-officers; partly from English text-books and the arguments of the English barristers who occasionally appeared in the Provincial courts; partly from the lectures on law delivered since 1865 in the Presidency Towns" (4). "It is perfectly 17 Evidence.

(1) *Abstract of Proceedings of the Council of the Governor-General*, 6th September, 1870 per Sir James Stephen.

(2) *Field's Law of Evidence*, 4th Ed. Introduction pp. 15, 16. Whitley Stokes' *Anglo-Indian Codes*. Vol. II. 812. Woodroffe on *Evidence* 5th Ed. p. 6.

(3) *Queen v Khyroolla* (1866) B.L.R. Sup Vol. 11, 14 See also *Abstracts of Proceedings* 18th April, 1871. per Sir James Stephen.

(4) Whitley Stokes' *Anglo-Indian Codes*. Vol II 812.

L.E.C. II.

manifest" says Lushington (1), "the practitioners and the judges of the Native Courts in the East Indies, have not that intimate acquaintance with the principles which govern the reception of evidence in our own Tribunals; we must look to their practice, we must look to the essential justice of the case, and not hastily reject any evidence, because it may not be accordant with our own practice."

There was little in the old Regulations applicable to evidence Rules as to witnesses, corresponding generally with those contained in the present Codes of Criminal and Civil Procedure were made by Regulations by the respective Government of the three different Presidencies (2).

The whole of the Indian law of evidence might, (before the passing of the Indian Evidence Act) have been divided into three portions. I. First portion settled by the express enactments of the Legislature; II The second portion settled by judicial decisions; III. The third or unsettled portion, and this by far the largest of the three, which remained to be incorporated with either of the preceding portions (3) When the largest portion of the law of evidence in British India was unsettled, it would be idle to say that there was no uncertainty in this branch of law

III. Limitation

In the Presidency Towns the English Law of Limitation as contained in 21 J I c 16 and 4 Anne, c.16 was adopted by the respective Supreme Courts (4). The English Statute 9 Geo IV c 14 was extended to India by Act XIV of 1840 The Supreme Courts at Calcutta and Bombay, also decided that the English Law of Limitation as being part of the *lex fori* was applicable to Hindu suitors in those courts

In the Mofussil, so far as the Hindus were concerned, they had several texts relating to limitation and prescription in the Hindu law books But the Mahomedans had no law of limitation or prescription (5). The earliest Regulation, in which the subject of limitation of suits was referred to, is the Judicial Regulation of 21st August, 1772 (generally known as the Plan of Warren Hastings). Section 15 of that Regulation provided, amongst other things,

Plan of Warren
Hastings
Rule 15.

(1) *Unde v Pemmasamy* (1858) 7 M.I.A. 128, 137. See also *Naiagunt v Pengama* (1861) 9 M.I.A. 66, 90.

(2) See Whitley Stoke's *Anglo-Indian Codes*, Vol. II. 812, 813 for those regulations.

(3) Field's *Law of Evidence*. Introduction, 4th Ed. p. 19

(4) *East India Company v Odit* (1849) 5 M.I.A. 43; *Ruckmahoy v. Lalloobhoy* (1852) 5 M.I.A. 234, 248.

(5) See Mr. Justice Rahim's *Mahomedan Jurisprudence. Tagore Law Lectures* for 1907. p. 374. *Khijaraunissa v. Risaunissa* (1870) 5 B.L.R. 84, 87.

that "complaints of so old a date as twelve (12) years should not be actionable." Then came the Bengal Regulation III of 1793. Section 14 of that Regulation provided that as a rule all suits should be brought within twelve years of the time at which the cause of action arose. The Law of Limitation introduced by the Regulations was applicable both to Hindus and Mahomedans (1). But there were very few provisions about the institution of suits, in the Bengal Regulations. As to appeals, a limitation rule was prescribed by Bengal Regulation VII of 1832 § 2. As to applications the only rule in the Regulations was Section 3 of Bengal Regulation VI of 1813. These Regulations contained no rules as to applications for the execution of decrees; but the twelve years' limitation was adopted in the Mofussil by analogy to the general law for the trial of suits; and such applications might, under slight restrictions, be renewed every twelve years. There seems to have been no such rule in the Madras or the Bombay Mofussil (2).

LEC. II.
Ben Reg. III of 1793 § 14.
Bengal.
Institution of suits
Appeals.
Applications.

In the Madras Presidency, Madras Regulation II of 1802, prescribed a rule similar to the one laid down by Bengal Regulation III of 1793 § 14. But exceptions were made in the case of claims founded on mortgages and on certain bonds, "the period for rendering which obsolete and unactionable is to be determined by the laws of the country" which, probably, meant local usage. No time was fixed for suits by Government (3). As to appeals, Madras Regulation IV of 1802 § 2; V of 1802 and other Madras Regulations prescribed limitation rules on this subject. The Madras Regulations contained no limitation rule as to applications.

Madras
Suits.
Appeals.
Applications.

Limitation rules as to the institution of suits were contained in §§ 1-4, 7-8 of Bombay Regulation V of 1827. There was no limitation for suits to recover mortgaged property, unless where it had been held for more than thirty years by a *bonafide* possessor as proprietor.

Bombay.
Suits.

No period of limitation was prescribed for suits by Government.

As to appeals, Bombay Regulations IV of 1827 §§ 73, 90 and VII of 1827 § 10 and VII of 1831 §§ 3 & 4 prescribed the limitation rules.

Appeals.

(1) *Khijarunissa v. Risaunissa* (1870) 5 B.L.R. 84, 87. See also Lec VIII How far has codification touched Hindu and Mahomedan Law

(2) Whitley Stokes' *Anglo-Indian Codes*, Vol II. p. 941.

(3) Whitley Stokes' *Anglo-Indian Codes* Vol. II. 941. Bengal Regulation II of 1805 fixed sixty (60) years as the period of limitation for such suits.

LEC. II.
Applications.

As to applications, Section 21 of Bombay Regulation IV of 1827 only prescribed a limitation rule for applications for replacing suits struck off the file.

Punjab.

The Punjab Civil Code contained some limitation rules (Part II §1 cls 6-10) which were modified by various letters from the Government of India (1).

It is clear from what has been stated above that there were different limitation rules, not only in different Presidencies, but also in different Courts in the same Presidency (2)

IV. Civil
Procedure
Nine different
systems.

Prior to the year 1859 there were no less than nine different systems of Civil Procedure simultaneously in force in Bengal, four in the Supreme Court, corresponding to its common law, equity, ecclesiastical and admiralty jurisdictions; one for the Court of Small Causes at Calcutta; one in the military Courts of Requests; and three in the Courts of the East India Company, one for regular suits, a second for summary suits, and a third applicable to the jurisdiction of the Deputy Collectors in what were called resumption suits (3). The Procedures of the Supreme Court were all founded on the Charter of Geo III dated 26th March, 1774. The procedure of the Calcutta Small Cause Court was originally founded on (a) the Instructions of the Court of Directors sent out in 1753, soon after George II granted the Charter which established the Court of Requests (b) 39 & 40 Geo III (July 28, 1800) and (c) the Proclamation, declaring and defining the jurisdiction, powers and practice of the Court of Commissioners for the recovery of small debts, made on the 18th March, 1802. "Whereas" runs the Proclamation "great complaints have been made of the mode of issuing summonses, and particularly that they contain no day certain when the defendant is to appear, and of the conduct of the inferior officers of the Court of Requests, in order to prevent the like in future, We do hereby order and direct that in all summonses and other process issued by the said Court of Requests, shall be signed by one of the Commissioners thereof, and shall be made returnable at a day certain not exceeding one month, from the date of the issuing of the same, upon which day the defendant is to appear, and the cause to be proceeded in by examination of parties and evidence in the same manner as such causes are directed to be

(1) For the history and contents of the *Punjab Civil Code*, see infra "*Punjab Civil Code*"

(2) *Peeramma v. Abbiah* (1894) 18 M. 99, 106 per Muthusami Ayyar, J.

(3) Whitley Stokes' *Anglo-Indian Codes*, Vol II p 381.

proceeded in by the instructions sent by the Hon'ble the I.A.C. II. Court of Directors, for regulating the proceedings of the Court of Requests in the year 1753, except in so far as the same shall have been altered by this Our Proclamation or in so far as the same be altered by any rules or orders, which it may be found expedient to make for the future Government of the said Court (1); and We further order and direct that the said Court shall have full power and authority to make and frame such rules and regulations as may be necessary, to direct the process or practice of the same; Provided always, that no rules shall be made which may be inconsistent with this our Proclamation, nor shall any rule or order framed by the said Court be in force till the same shall have been allowed by the Supreme Court of Judicature and that the same when so allowed be permitted. We hereby direct and order, that the said Court and its proceedings shall be, and they are hereby declared to be subject to the control of His Majesty's Supreme Court, in as full and ample a manner to all intents and purposes as the former Court of Requests (2).

Procedure in the military Courts of Requests was governed by Act XI of 1841.

In the provincial courts of the Company, Impey's Regulation of 1781 was the first Code of Civil Procedure. This was followed by Regulation III of 1793 which was applicable chiefly to regular suits; "the practice of the courts being more similar to that of the courts of equity, than of common law, and there was only one class of cases for which it was then considered necessary to provide a more summary procedure. These were suits for the forcible dispossession of disputed land and crops. But the summary procedure was extended to cases connected with the collection and exaction of rent

Provincial Courts.

(1) When Dr. Whitley Stokes says "the source of the procedure of the Small Causes Court I have not been able to ascertain" he means, I think, the Instructions of 1753 sent out immediately after the grant of the Charter by Geo II dated the 8th January, 1753 establishing the Courts of Requests in the Presidency Towns. But this Proclamation shows what the Procedure was, as given by those Instructions.

(2) This Clause clearly shows that all applications for revision under §115 of the Civil Procedure Code, 1908 can be made only in the Original side of the High Court and not before the Divisional Bench taking cases from the Presidency group. This Proclamation was not referred to in *Re the application of a vakeel of the appellate side* (1903) C.W.N. 813. The Proclamation is given in Smault and Ryan's *Rules and Orders* Vol II pp. XI, XV, XVI. There were two other Proclamations extending the jurisdiction of the Commissioner and continuing the control of the Supreme Court. Dated the 25th September, 1813 and 29th October, 1819,

LEC. II. *Mutatis mutandis* it may be said that in other parts of British India, the systems of Civil Procedure were equally numerous, and, it may be added, equally imperfect" (1).

V. Contract. The English Common and Statute Law (so far as it was applicable to the Indian circumstances), which prevailed in England before 1726, was introduced into the Presidency Town of Calcutta by the Charter of 1726. But it was subsequently found that the application of English Law to the natives of this country caused great deal of hardship. To obviate this difficulty Section 17 of Geo.III. c 70 (1781) reserved their peculiar laws to Hindus and Mahomedans of Bengal in certain civil matters, including contract (2). By Section 13 of 37 Geo. III c.142 (1797) the laws of the Hindus and Mahomedans were reserved to them in certain civil matters in Bombay and Madras (3).

Bombay and Madras The effect of these Statutes was that in the Presidency Towns, in a suit on a contract, Hindu law was applied when the parties were Hindus and Mahomedan law applied when they were Mahomedans, and this rule continued till the passing of the Indian Contract Act (4).

Zilla & city courts. Section 21 of Regulation III of 1793 directed the judges of the Zilla and City Courts to act according to justice, equity and good conscience in cases where no specific rule existed Madras Regulation II of 1802 §17 and Bombay Regulation IV of 1827 §26 also made a similar provision. In the Mofussil the Hindu and Mahomedan law as such was not strictly applicable to cases arising from contracts and such cases were governed by the rule of "justice, equity and good conscience" based upon the customary law of the land which, in the absence of proof of any special usage or custom, was presumed to be in accordance with the texts of the Hindu or Mahomedan law as the case may be (5). Thus in the Mofussil a system of so-called equity and good conscience had been nominally pursued, that is to say,

(1) Whitley Stokes' *Anglo-Indian Codes*, Vol. II. 383.

(2) Morley's *Digest* Introduction XVI Smout and Ryan's *Rules and Orders* (1839 Ed.) Vol. I. 65, 66.

(3) In 1726 Mayors' Courts were established in Calcutta, Bombay and Madras. These courts were reconstituted and re-established in 1753. Calcutta Mayors' Courts was superseded by the Supreme Court in 1773, which was in its turn superseded by the High Court in 1862. The Mayors' Courts in Bombay and Madras were superseded by the Recorders' Court in 1797. Bombay Recorders' Court was superseded by the Supreme Court in 1823. Madras Recorders' Court was also superseded by the Supreme Court in the same year. Both Bombay and Madras Supreme Courts were superseded by High Courts in 1862. See Morley's *Digest*. Introduction pp. XVI and XVII.

(4) *Madhub v. Rajcoomar* (1874) 14 B.L.R. 76, 84.

(5) *Ismail Kani v. Nazar Ali* (1903) 27 M. 211, 216, 217.

the provincial courts had not been absolutely subject to the rules and principles of English law, as regards contracts, but practically they had pursued that law (1).

LEC. II.

During the debate on the renewal of the Charter of the Company in 1833, Mr. Buckingham, a member of the House of Commons (formerly the editor of the "*Calcutta Journal*" and expelled from India in 1827 by an order of Mr. Adam, the then Governor-General of India) referring to the uncertain and different laws relating to the liberty of the Press in the different Presidencies, cited several striking instances of the extreme uncertainty of the law in India. One of them was that Lord Hastings soon after his arrival in India removed the censorship of the Press in Bengal on the 16th August, 1818. The Governor of Madras, Mr. Elliot, wholly disapproved of this step, and not only did he refuse to follow the example in his Presidency, but he visited with his Government's displeasure the distinguished individuals who ventured to express approbation of what Lord Hastings did. The second instance was that Mr. Buckingham had entered into a contract with the Post Master General of India to facilitate the despatch of his paper and paid Rs. 5000 per month for the free transmission of his "*Journal*" through the Company's territories. but after its payment in Bengal, the Governor of Madras was determined that no "*Journal*" should pass free in his Presidency, though the full postage on it had been paid, and had them stopped at Ganjam and charged with postage all the way to their destination, and on appeal to the Governor-General under whose authority the contract had been made for all India, no redress could be had and no refund was made (2).

Remarks of Mr. Buckingham.

One of the great disadvantages of the co-ordinate authority of the different Provincial Councils was that the regulations passed by the different local governments were often in conflict with each other and there was much uncertainty of law in British India at that time. This uncertainty of law was a serious defect in the Indian administration and was referred to by the Judges of the Supreme Court at Fort William in 1820, in their correspondence with Lord Metcalfe, in the following terms "No one can pronounce an opinion or form a judgment, however sound, upon any disputed right of persons respecting which doubt and confusion may not be raised by those who may choose to

(1) *Abstracts of proceedings of the Legislative Council of the Governor-General of India* (1867), p. 379.

(2) *Hansard's Debates* Third series Vol XVIII 777, 778.

LEC. II.

Judges of the
Supreme Court to
Lord Metcalfe.

call it in question ; for very few of the public or persons in office, at home, not even the law officers, can be expected to have so comprehensive and clear a view of the present Indian system, as to know readily and familiarly the bearings of each part of it on the rest. There are English Acts of Parliament specially provided for India, and others of which it is doubtful whether they apply to India wholly, or in part, or not at all. There is the English common law and constitution, of which the application, in many respects is still more obscure and perplexed ; Mahomedan law and usage ; Hindu law, usage and Scripture ; Charters and Letters Patent of the Crown ; Regulations of the Government, some made declaredly under Acts of Parliament particularly authorizing them, and others which are founded, as some say, on the general power of Government entrusted to the Company by Parliament, and as others assert on their rights as successors of the old native Governments ; some regulations require registry in the Supreme Court, others do not ; some have effect generally throughout India, others are peculiar to one presidency or one town. There are commissions of the Governments, and circular orders from the Nizamut Adawlut, and from the Diwanny Adawlut ; treaties of the Crown ; treaties of the Indian Government ; besides inferences drawn at pleasure from the application of the "droit public," and the law of nations of Europe, to a state of circumstances which will justify almost any construction of it, or qualification of its force" (1).

Matters drifted on from bad to worse till 1833, when the question of the renewal of the Charter of the East India Company came up before Parliament, on June 13, 1833 Mr Charles Grant in moving certain resolutions respecting the Charter of the Company referred to the view of the judges of the Calcutta Supreme Court, quoted above, and said that the defects which arose from the imperfections in the frame of the Government might be stated as particularly three, and they were in the laws themselves, in the authority for making them, and in the manner of executing them. On the 10th July, 1833, during the debate on the same subject, Lord Macaulay demonstrated the necessity and practicability of codification, that is, the conversion of all law into a written and systematically arranged code, in British India. On that occasion he also laid down the principle to be followed in codifying the laws in British India. "I believe," said Lord Macaulay, "that no country ever stood so

(1) Hansard's *Debates*. Third series (1833). Vol XVIII, 729.

much in need of a code of laws as India, and I believe also that there never was a country in which the want might so easily be supplied. In India, now there are several systems of law widely differing from each other, but co-existing and co-equal. The indigenous population has its own law . . . the Mussulman his Koran and its innumerable commentors—the Englishman his Statute Book and his Term Reports . . .

As there were established in Italy at one and the same time, the Roman law, the Lombard Law, the Ripurian Law, the Bavarian Law, and the Satic Law, so we have now in our Eastern Empire, Hindu Law, Mahomedan Law, Parsee Law, English Law perpetually mingling with each other and disturbing each other, varying with the person, varying with the place. In one and the same cause the process and pleadings are in the fashion of one nation the judgment is according to the laws of another, an issue is evolved according to the rules of Westminster and decided according to those of Benares . . .

If a point of Hindu Law arises the Judge calls on the Pundit for an opinion. If a point of Mahomedan law arises, the Judge applies to the Cazee. Sir William Jones declared that he could not answer it to his conscience to decide any point of law on the faith of a Hindu expositor. Sir Thomas Strange confirms this declaration. Even if there were no suspicion of corruption on the part of the interpreters of the law, the science which they profess is in such a state of confusion that no reliance can be placed on their answers. Sir Francis Macnaghten tells us that it is a delusion to fancy that there is any known and fixed law under which the Hindu people live; that texts may be produced on any side of any question, that expositors equal in authority perpetually contradict each other, that the obsolete law is perpetually confounded with the law actually in force, and that the first lesson to be impressed on a functionary who has to administer Hindu Law is, that it is vain to think of extracting certainty from the books of jurists. What is administered is not law but a kind of rude and capricious equity. I asked an able and excellent Judge lately returned from India how one of our Zilla Courts would decide several legal questions of great importance—questions not involving considerations of religion or caste—mere questions of commercial law. He told me that it was a mere lottery. He knew how he should himself decide them. But he knew nothing more. Judge-made law in a country where there is an absolute government and lax morality,—

LEC. II.

Lord Macaulay.

Necessity and practicability of codification in India.

Its principle.

LÆC. II.
Macaulay.

where there is no bar and no public—is a curse and scandal not to be endured. It is time that the Magistrate should know what law he is to administer, that the subject should know under what law he is to live. I believe there is no country in which that great benefit can more easily be conferred. The work of digesting a vast and artificial system of unwritten jurisprudence is far more easily performed and far better performed by few minds than by many, by a Government like that of Prussia or Denmark than by a Government like that of England. A quiet knot of two or three veteran jurists is an infinitely better machinery for such a purpose than a large popular assembly divided, as such assemblies almost always are, into adverse factions. This seems to me, therefore, to be precisely that point of time at which the advantage of a complete written code of laws may most easily be conferred on India. It is a work, which cannot be well performed in an age of barbarism, which cannot without great difficulty be performed in an age of freedom. It is the work which especially belongs to a Government like that of India—to an enlightened and paternal despotism” (1). In formulating the principle to be followed in codifying the laws in British India, Lord Macaulay said “We must know that respect must be paid to feelings generated by differences of religion, of nation and caste. Much, I am persuaded, may be done to assimilate the different systems of law without wounding those feelings. But whether we assimilate those systems or not, let us ascertain them, let us digest them. We propose no rash innovation, we wish to give no shock to the prejudices of any part of our subjects. . . . Our principle is simply this—uniformity where you can have it—diversity where you must have it—but in all cases certainty” (2).

Necessity for
Codification

Owing to the co-existence of different systems of law—to the conflicting opinions of commentators of Hindu and Mahomedan law of equal authority and to the growing bulk and intricacy of the different branches of law in this country, it was necessary to systematize the law, to simplify its structure, to reduce its bulk and so to render it more accessible to the public or in other words to codify it.

Such was the state of law in Bengal, Madras and Bom-

(1) *Hansard's Debates*. Third Series, Vol. XIX. 531, 533. For this reason Bentham himself wrote to the Czar of Russia asking him to have the laws of Russia codified. See *Edinburgh Review* Vol. XXIX. 224.

(2) *Hansard's Debates*. Third Series. Vol. XIX. 533

bay and now let us see what was the state of law in the Punjab when it was annexed to British India. Line II.

The vague state of the law in the Punjab, before the passing of the Punjab Laws Act IV of 1872, had involved very great practical inconveniences. Sir James Stephen, in presenting the final Report of the Select Committee on the Punjab Laws Bill referred to three distinct instances of inconveniences that had arisen in that Province. The first instance referred to the uncertainty which existed on the question what regulations had been introduced into the Punjab. The leading regulation in the settlement law was the Bengal Regulation VII of 1822. Whether that Regulation was or was not introduced into the Punjab by certain letters written to the Board of Administration, was one of those indeterminate questions upon which any two persons might form different opinions. The view taken by Lord Lawrence and Sir Richard Temple, on one side, was entirely different from the view taken by a distinguished settlement officer, Mr Prinsep, on the other, and the Chief Court of the Punjab took the same view as Mr Prinsep and held that the Regulation was law in the Punjab. The view of Lord Lawrence and Sir Richard Temple was that the Regulation VII of 1822 was never introduced into the Punjab at all; but that it was held up to the settlement officers as a guide in their proceedings for the settlement of the Province. The very fact of a controversy of this kind arising between two leading authorities in the Punjab is sufficient to show clearly the extreme importance of putting into a definite shape the laws in force in that Province.

The second illustration is also of very great importance. Certain rules had been passed, by which the obligation of attending roll-calls was imposed upon those who were known as the habitual criminal tribes of the Punjab and they had been acted upon for a considerable time. After a certain time, the Punjab Chief Court declared that those rules had not the force of law and that they did not form part of the rules which were confirmed by the Indian Council's Act. The effect of that ruling was to set a number of wandering criminal tribes free from all control, and to put a number of officers in the Punjab into the position of having done a series of illegal acts when they supposed that they were discharging their duties. Here again is another instance of the extreme practical inconvenience of the uncertainty as to what is and what is not law. and instances.

I, EC. II.

3rd illustration
of inconvenience

The *Punjab Civil Code* contained certain insolvency rules, the effect of which was somewhat to vary the procedure followed upon that subject in other parts of India, at that time. After the sale of a very extensive property under the *Punjab Civil Code* had taken place, one of the Judges of the Chief Court held that the rules contained in that Code had not the force of law, and that the whole proceedings were null and void; and another Judge had held, in another case, with equal earnestness, that they had the force of law.

These instances clearly show that this vague state of the law in the Punjab had involved very great practical inconveniences and the Punjab Laws Act of 1872 (IV of 1872) and the Punjab Land Revenue Act (XXXIII of 1871 now repealed by Act XVII of 1887) were passed to remove the uncertainty of law in the Punjab.

(C) To check the
introduction of
the technical rules
of English law.

From the very beginning of the legal history of British India the judges had been directed to administer justice, equity and good conscience in certain cases. In such cases the judges generally based their judgments on the rules of English law and thus even the technical rules of English law were introduced into this country. The only way of checking this process of borrowing English rules from the recognised English authorities, is by substituting for those rules a system of codified law, adjusted to the best Native customs and to the ascertained interests of the country (1).

justice, equity and
good conscience

In dealing with this branch of the subject we shall notice *first* how and when the doctrine of "justice, equity and good conscience" was introduced into this country and whether the judges can now administer justice and equity; *secondly* how the application of this doctrine influences the development of law in general; and *thirdly* how the application of this maxim introduced the technical rules of English law into this country and what steps were taken to prevent this danger.

How and when
introduced.

First, whether in the revenue administration or in the administration of justice the guiding principle of the early Anglo-Indian administrators was not to interfere with the laws of the country unless they were iniquitous or unjust. Thus we find it stated (2) "Though seven years had elapsed since the Company became possessed of the dewanny, yet

(1) Despatch from Lord Salisbury (the then Secretary of State for India) to the Government of India. Dated the 20th January 1876.

(2) *Letter from the President in Council to the Court of Directors* dated the 3rd November, 1772. See Harington's *Analysis* Vol. II. p. 8.

no regular process had ever been formed for conducting the business of the revenue. Every zemindaree, and every talook, was left to its own particular customs. These indeed were not inviolably adhered to; the novelty of the business to those who were appointed to superintend it, the chicanery of the people whom they were obliged to employ as their agents, the accidental exigencies of each district, and not unfrequently the *just discernment of the Collector, occasioned many changes*." In this "just discernment of the Collector" lies the origin of this doctrine. Here we find the ideas of the British Collectors in the Muffasil, ideas based on the rules of English law and sentiments, silently affecting the laws of this country.

Then by Clause XVIII of the Charter of the Supreme Court of Judicature at Fort William in Bengal (dated 26th March, 1774) it was ordained that the said Court should be a court of equity, and "shall and may have full power and authority to administer justice, in a summary manner, as nearly as may, according to the rules and proceedings of our High Court of Chancery in Great Britain"; this Clause conferred on the Judges of the Supreme Court the power to administer justice and equity. The High Court at Calcutta inherited this right from the Supreme Court. Other Chartered High Courts have also got the same right.

The Plan of Warren Hastings, 1772, did not provide for the application of this maxim. Such a provision for the Sudder Dewanny Court was made by Sir Elijah Impey's Regulation (5th July, 1781). Section 93 of this Regulation provided "that in all cases, for which no specific directions are hereby given, the Judges of the Sudder Dewanny Adawlut do act according to justice, equity and good conscience" (1).

Section 21 of Reg. III of 1793 directed the judges of the Zillah and City Courts, in cases where no specific rule existed to act according to justice, equity and good conscience. A similar provision was made for the provincial courts of appeal by §32 of Reg. VI of 1793. Section 6 of Reg. V of 1831 enacted that in all cases of inheritance or succession to landed property, in which the plaintiff was of different religious persuasion from the defendant, the decision was to be regulated by the law of the latter. But in cases in which the above rule could not be applied, the Munsiffs were to act according to justice, equity and good conscience.

LEC. II.

Letter from the President in Council to the Court of Directors, dated 2d Nov. 1772.

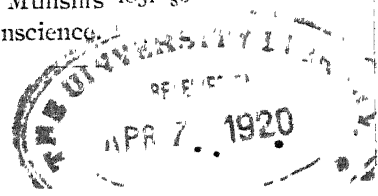
Charter of the Supreme Court 1774.

Regulation of Sir Elijah Impey (5th July, 1781).

Zillah & City Courts. Reg. III of 1793 §21.

Reg V of 1831 §6

(1) See also Reg. VI of 1793 §31.



LEC II.

Then in 1832 (1) it was enacted that where one or more of the parties to civil suits were neither Hindus nor Mahomedans the decision should be governed by the principle of justice, equity and good conscience (2) Section 3 of Act XXVI of 1852 made a similar provision for Sudder Ameen and Munsiffs.

Bengal, U. P
and Assam.

The direction to act, in the absence of any specific rule, according to justice, equity and good conscience is to be found in the Bengal, United Province and Assam Civil Courts Act (XII of 1887) §37.

Madras.

In Madras a similar provision was made by §17 of Regulation II of 1802 Now, Madras Civil Courts Act (III of 1873) §16 provides for the application of the maxim of justice, equity and good conscience.

Bombay.

For the Mofussil Courts of Bombay, Bombay Regulation IV of 1827 §26, which is still in force, provides —“The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case, in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and, in the absence of specific law and usage, justice, equity and good conscience alone”

Similar provisions have been made for the courts in the Central Provinces (3), Lower Burmah (4); Oudh (5), the Punjab (6) and the North West Frontier Provinces (7).

Justice, equity and
good conscience.

Secondly we shall consider how the application of this maxim affected the development of law in this country True, sometimes the application of this maxim involved the introduction of technical rules of English law, unsuited to the condition of the people of this country but on the whole the judicious application of this maxim helped the development of different branches of law in this country The Japanese Civil Code also introduced this maxim into Japan and by its application many salutary rules of commercial law of England have been introduced into Japan Then again as Codes can never be exhaustive, the present Civil Procedure Code of India (V of 1908) has expressly

(1) Reg VII of 1832 §9.

(2) Reg. VII of 1832 Repealed by the Civil Courts Act of 1871, which again has been repealed by Act XII of 1887.

(3) Act XX of 1875 §§5, 6.

(4) Act XI of 1880 §4 also Burma Laws Act (XIII of 1898) §13.

(5) Act XVIII of 1876 §3.

(6) Act IV of 1872 §5 as amended by Act XII of 1878.

(7) The N W Frontier Province Law and Justice Regulation (Reg VII of 1901). *The Punjab Code* 3rd Ed p 559

directed the Courts to apply this maxim, whenever it will be necessary for the ends of justice. LEC. II.

Thirdly let us see how the application of this rule introduced the technical rules of English law. "Now, having to administer justice, equity and good conscience" says Sir Barnes Peacock (1) "where are we to look for the principles which are to guide us? We must go to other countries where equity and justice are administered upon principles which have been the growth of ages, and see how the courts act under similar circumstances; and if we find that the rules which they have laid down are in accordance with the true principles of equity, we cannot do wrong in following them." "Though justice, equity and good conscience" says Sir James Stephen (2) "are the law which Indian Judges are bound to administer, they do in point of fact resort to English law books for their guidance on questions of this sort, and it is impossible that they should do otherwise, unless they are furnished with some such specific rule as this Act (Contract Act) will supply them with" In *Waghela v. Shekh Mashudin* (3) their Lordships of the Judicial Committee remarked that "equity and good conscience" had been "generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances" The Judges in British India in deciding cases by this maxim, decided them by the rules of English law and thus many rules ill-suited to the habits and institutions of the Indians, indirectly found their way into India by means of that informal legislation which was gradually effected by judicial decisions. In course of time it was found necessary to check the introduction of such technical rules of English law. "The only way of checking this process of borrowing English rules from the recognized English authorities is by substituting for those rules a system of codified law, adjusted to the best Native customs and to the ascertained interests of the country" (4).

The introduction of the technical rules of English law into this country was effected by the Judges in British India by the application of the maxim of "justice, equity and good conscience" or in other words it is a necessary evil of legislation by the judiciary.

Justice, equity and good conscience.

Where are the principles to guide the court to be found.

(1) *Saroop v. Troylakhonath* (1868) 9 W R 230, 232. See also *Brojo v. Ramanath* (1897) 24 C. 908, 930.
 (2) *Supplement to the Gazette of India*. May 4, 1872 p. 535.
 (3) (1887) 14 I.A. 89, 96. See also *Dada v. Babaji* (1868) 2 Bom. H C R. 36, 38, *Webbe v. Lester* (1865) 2 Bom. H C R. 52, 56.
 (4) *Despatch from Lord Salisbury (the then Secretary of State for India) to the Government of India*. Dated the 20th January, 1876.

L.E.C. II.

(D) To avoid the evils of judicial legislation.

Elasticity of Judge-made law.

Wason v Walter

Reply to above.

The fourth reason why codification is necessary in British India, is to avoid the evils of legislation by judicial authorities. "Judge-made law" says Lord Macaulay (1) "in a country where there is an absolute government and lax morality—where there is no bar and no public—is a curse and scandal not to be endured." This is not the place to discuss the advantages and disadvantages of judge-made law and I shall notice here only two points in this connection—I Elasticity of judge-made laws. "Whatever disadvantages" says Lord Cockburn (2) "attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied" The most convincing reply to this argument is to be found in the Report of the Royal Commission on the English Criminal Code Bill. The Report of this Commission was drafted by Sir James Stephen and in this Report Sir James Stephen and other Commissioners say (3) "In order to appreciate the objection, it is necessary to consider the nature of the so-called discretion which is attributed to the judges. It seems to be assumed that, when a judge is called upon to deal with a new combination of circumstances, he is at liberty to decide according to his own views of justice and expediency; whereas, on the contrary, he is bound to decide in accordance with principles already established, which he can neither disregard nor alter. The consequences of this are, first, that the elasticity of the common law is much smaller than it is often supposed to be; and secondly, that so far as a Code represents the effect of decided cases and established principles, it takes from the judges nothing which they possess at present. In fact, the elasticity so often spoken of as a valuable quality, would, if it existed, be another name for uncertainty. . . . The truth is the expression "elasticity" is altogether misused when applied to English law. The great characteristic of the law of this country is that it is extremely detailed and explicit, and leaves hardly any discretion to the judges."

(1) *Hansard's Debates*. Third Series. Vol XIX 531-533.

(2) *Wason v Walter* (1868) L R. 4 Q.B. 93

(3) Stephen's *Criminal Law of England*. Vol III. 352

II. Respect for precedent is the necessary foundation of judge-made law (1). The result of this reverence for precedents is that we have frequently to take a rule as it is given in an early and undeveloped state of society, and to abide by it, until public opinion is roused to its absurdity and the legislature is forced to intervene. True, judicial conception of utility or of the public interest may sometimes rise above the ideas prevalent at a particular era. But it has often happened, says Prof. Dicey (2) that the ideas entertained by the judges have fallen below the highest and most enlightened public opinion of a particular time. Thus if we take the case of the law relating to married women in England and examine the changes it has undergone we shall see how completely the common law can be out of touch with the popular views and sentiments of the times. Early in the nineteenth century, woman had come to be recognised as standing more or less on the same footing as man. Yet for a long time afterwards, English law considered her position as one of almost absolute subjection, when she entered into the marriage relation, after marriage she became unfit in the eye of the law to enjoy rights over property, or, with few exceptions, to enter into contracts on her own behalf. But in contemporary English literature we do not find slightest suggestion that she occupied such a low position in the relations of life. "We may" says Prof. Dicey (3) "at any rate as regards the nineteenth century, lay it down as a rule that judge-made law has, owing to the training and age of our judges, tended at any given moment to represent the convictions of an earlier era than the ideas represented by Parliamentary legislation. If a statute is apt to reproduce the public opinion not so much of to-day as of yesterday, judge-made law occasionally represents the opinion of the day before yesterday." In British India the Judges are bound, in some cases, to administer Hindu, Mahomedan or Buddhist law according to the nature of those cases. Sometimes the rules of law enunciated as the rules of Hindu, Mahomedan or Buddhist law do not represent the convictions of the educated public, but those of an earlier era. Thus in a recent case from Burma (4), where the questions for decision were whether the plaintiff was lawfully married to one M. and whether as his

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Harsh and unjust rules stereotyped.

(1) Prof. Dicey's *Law and Opinion in England*. Lec. XI p. 365.

(2) *Law and Opinion in England*. p. 366.

(3) *Law and Opinion in England*. Lec. XI. 367.

(4) *Mi Me v. Mi Shwe Ma* (1912) 16 C.W.N. 529, 533.

LÆC. II.

Mi Me
us
Mi Shwe Ma

widow she was entitled to share equally in his estate with the defendant, the District Judge an educated Burman dismissed the suit, but the Judicial Commissioner, an Englishman reversed that decision and held that the plaintiff was lawfully married to M. and as his widow was entitled to half share. On appeal to the Privy Council, their Lordships of the Judicial Committee held that the Judicial Commissioner was right, and remarked "The law relating to marriage in Burma is extremely lax. No ceremony of any kind is necessary. The lax notions prevalent among the lower classes on the subject seem to be generally deplored and condemned by their betters, and it may be that the difference of opinion between the two courts is due in some measure to the fact that the District Judge was a native gentleman, an educated Burman, who naturally regarded with little favour if not with positive repugnance practices tolerated by the law of his country, but not in accordance with the standard of a higher civilization. On the other hand, the Judicial Commissioner was an Englishman of great experience, without any prejudice in favour of Western notions, whose only object seems to have been to administer the law truly and indifferently as he found it laid down in the *Dhammathats*, and the rulings of his predecessors, and in Sir John Jardine's "*Notes on Buddhist Law*" which seems to be the principal authority on the subject." Thus we find the highest Judicial authority in the realm taking away the elements of expansion contained in Buddhist law and stereotyping old and harsh laws. Here we also find that the objection to codification that it stereotypes laws and checks its natural growth and hinders its free development is also applicable to judge-made laws in some cases.

No system of law can be said to be in a satisfactory condition which has to depend on case-law for its exposition. A vast number of points will necessarily remain unsettled under such a system until the highest tribunals have had the opportunity of deciding them. Judicial officers again are frequently influenced by their own peculiar idiosyncrasies. The evil of the divergence of views of the judges has a tendency to increase and not to diminish. With the accumulation of conflicting precedents, the task of ascertaining what law is to govern the parties in a given case becomes more and more difficult, and when a right of appeal to two or more courts is permitted, the amount of uncertainty is pushed to a point which must necessarily produce

great embarrassment and cause a corresponding depreciation in the value of property, besides enhancing the attendant evils of expense and delay in litigation. "Well-designed legislation" says Sir James Stephen (1) is the only possible remedy against quibbles and chicanery. All the evils which are dreaded from legal practitioners can be averted in this manner and in no other. To try to avert them by leaving the law undefined, and by entrusting Judges with a wide discretion, is to try to put out the fire by pouring oil upon it. Leave a Judge with no rule, or with one of those leaden rules which can be twisted in any direction, and you are at once open to the advocate every sort of topic by which the discretion of the judge can be guided. Shut the lawyers' mouth, and you fall into the evils of arbitrary government."

LEC. II.

Remedy
codification.

In Hindu jurisprudence, as in other ancient systems of law, the *family* and not the *individual* is the unit of society, but the present day movement is from *status* to contract. If the different ancient Indian communities are left to themselves and to the ordinary process of internal development and progress, the transition of ideas will naturally be from *communism* to *individualism*, which must necessarily tend to destroy the whole village system. "To codify, on the other hand, the existing customs," say the exponents of codification of customary law, "would perpetuate that system or, at least, retard its break up. We should therefore not be hampering a healthy development, but avoiding a disastrous tendency to disruption. We should not be asphyxiating progress, but ensuring the prosperity of the agricultural classes by preserving for them the possession of their lands and the constitution of their communities. We should not be introducing any novel or distasteful legislation, but doing our best to maintain all that was healthy and good in a system which was suited to the people. We should lastly, have certainty for uncertainty, a written and stable law instead of a wilderness of judicial precedents, bewildering to the litigant and confusing to the court" (2). We shall deal with this subject in Lecture X.

(1) To preserve
the customs suited
to the people
of the countryTo preserve
customs.

It has already been mentioned (3) that after Napoleon's final defeat, the Congress of Vienna caused the German confederation to be formed and many of the smaller territories were absorbed by the neighbouring states, but the

(1) Unifying
influence of codes.

(1) *Gazette of India. Supplement*, May 4, 1872 p. 529.

(2) Sir William Rattigan's *Codification of the Punjab Customary Law*, in *14 Law Quarterly Review* 378 (1898)

(3) See *Introductory*.

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diversities of the law still continued. The idea of a German Code was discussed and the controversy between Thibaut and Savigny began. There was very little of legislation in Germany between the years 1815 and 1848, "but the national feeling which the wars of Napoleon had aroused in Germany, though discouraged by the political rulers, was fostered by the intellectual leaders, and was slowly gathering strength and power. The immediate result was a new activity in the field of national legislation" (1). "The German people" says Sir C. P. Ilbert (2) "were struggling towards national unity, national unity meant unity of law, and unity of law could not be brought about without codification."

"National unity could not be brought about without codification."

When we examine the legal history of Japan we find that up till 1867 there were some three hundred principalities which had their own different written laws, and the written laws of these three hundred principalities were modified by local customs of even more restricted validity, and across the territorial laws and customs there ran well-defined class distinction. But in 1868, the re-establishment of the Imperial supremacy in Japan dealt the death blow to feudalism and helped the promulgation of a common national law. Thus we see that unification of Germany and of Japan gave a great impetus to codification of laws in those countries. Codification, again in its turn, strengthened the bond of union between the different component parts of those countries.

British India.

In British India, the different Presidencies had originally a very loose connection with one another, and when Crown Courts were established for them, the law which those courts administered in common with one another was confined to the Presidency towns or to the British people. At the present day all parts of British India are bound up much more closely together: they are subject to a common authority in India, both executive and legislative, and there are great codes of law enacted for the whole country (3). When a valuable exposition of a portion of that general law has been made by one of the superior courts, the whole community has the full benefit of it. Such unity of law is a great help for national unity and welds into one homogeneous whole the different communities of the country.

(1) (1898) 14 *Law Quarterly Review*. 24.

(2) *Legislative Methods and Forms* 127

(3) For Non-Regulation Provinces see Lectures III and V.

In this connection we should notice that the rule-making power conferred on different provincial authorities and different High Courts should be very carefully exercised so that the rules made by those authorities should be as uniform as possible. Then again, when "provincial autonomy" is in the air, care should be taken not to divide the country into provinces which will have their own personal laws, having no connection with one another. Such a division will lead to isolation of, and diversity of laws in, different provinces (1)

I shall conclude this lecture with a quotation from the Despatch of the Government of India to the Secretary of State for India, dated the 10th May, 1877 which succinctly gives the reasons why the laws in British India should be codified. "We feel" runs the Despatch "that the reduction to a clear, compact and scientific form, of the different branches of our Substantive Law, which are still uncodified, would be a work of the utmost utility, not only to the judges and the legal profession, but also to the people and the Government. It would save labour and thus facilitate the despatch of business and cheapen the cost of litigation: it would tend to keep our untrained judges from error: it would settle disputed questions on which our superior courts are unable to agree. it would preclude the introduction of technicalities and doctrines unsuited to this country: it would perhaps enable us to make some urgently needed reforms without the risk of exciting popular opposition and it would assuredly diffuse among the people of India a more accurate knowledge of their rights and duties than they will ever attain if their law is left in its present state, that is to say, partially codified, but the bulk ascertainable only from English text-books written solely with reference to the system of English law, and from a crowd of decisions, often obscure and sometimes contradictory, to be found in the English and Indian law-reports."

Despatch from
Government of
India to The
Secretary of State
Dated 10th March,
1877

Conclusion

Necessary as codification is in this country, there are good many difficulties to be overcome by the British Indian Legislators before they will be in a position to make any further advance. One of those difficulties is the condition of the people of this country, which will be the subject-matter of our next lecture.

(1) For Statutory Rules and Orders see Lectures V. and VI.

LECTURE III.

THE INFLUENCE OF THE CONDITION OF THE PEOPLE ON CODIFICATION IN BRITISH INDIA.

The guiding principles of the Anglo-Indian administrators

The two guiding principles of the British Indian administrators at the end of the eighteenth century had been (a) to change the laws of the country as little as possible. (b) To apply the maxim of justice, equity and good conscience when it was necessary to change such laws. Adoption of these two principles by the early Anglo-Indian administrators was due to (i) their desire to follow their Roman prototype (1). "The object of our government in this country" wrote Lord Teignmouth (2) "should be to conciliate the minds of the natives, by allowing them the free enjoyment of all their prejudices, and by securing to them their rights and property."

(ii) Their desire not to violate the fundamental principle of all civil laws *viz*, that they ought to be suitable to the genius of the people, and to all the circumstances in which they may be placed (3).

Cardinal principle of legislation.

Solon

The cardinal principle of legislation that the laws should be suitable to the genius of the people for whom they are made had been recognised by legislators from a very early period of human history. Solon being asked if he had framed the best possible laws for the Athenians, replied "No ; but the best that they could have been induced to receive." "Laws and customs" says an eminent English writer (4) "are the work of a nation as a whole. They are indeed held binding and put in force by the ruling class, and they are shaped in their details by the professional class, but they are created by other classes also, because the rules which govern the ordinary citizens must be such as are fit to express the wishes of the ordinary citizen, being in harmony with his feelings, and adapted to the needs of his daily life They are the offspring of Custom and Custom

Bryce.

(1) Halhed's *Gentoo Code*. Translator's Preface IX.

(2) Lord Teignmouth's *Remarks on the mode of administering justice to the natives in Bengal ; and on the collection of the revenues* printed in the 6th Volume of 'India Papers.' 1787.

(3) *Vattel*. Bk. I. Ch. III. Harington's *Analysis*, Vol. I. Pt. I. p. 11.

(4) *The Annual address before the American Bar Association* by the Right Hon. James Bryce. August 28, 1907. 24 L. Q. R. 14 (1908).

is the child of the people. Thus it is not only the constructive intellect of the educated and professional class, but also the half-conscious thought of the average man which go to the making and moulding of the law " It may be said that this is true in the case of free and civilized nations of the West but is not so in the case of British India, where the laws have been and still are made by Legislatures which do not represent the people of the country. The reply to this argument is that though the people of the country had no place on the British Indian Legislatures, the British Indian Legislators always tried to find out the views of the people on any matter upon which they wanted to legislate. When those Anglo-Indian administrators and legislators found it impossible to introduce English laws as the general standard of judicial decisions in these provinces (1), they left the laws of the country unchanged as much as possible and attempted to administer the country by the indigenous laws. They tried to ascertain the indigenous laws, they had the leading principles of Hindu and Mahomedan laws translated and published in English (2), and had the revenue laws of the country carefully compiled and published (3). After ascertaining the laws, as much as they could, they left them unaltered, unless any portion of those laws, was found to be such as could not be administered by the servants of the Company. For the better instruction of the junior civil servants in the laws, usages and customs of the people of the country the authorities had to take steps for ascertaining the laws of the country. Thus in the preamble of Regulation IX of 1800 (establishing the Fort William College) we find the following passage "Whereas it hath pleased the Divine Providence to favour the counsels and arms of Great Britain in India with a continued course of prosperity and glory . and whereas the sacred duty, true interests, honour and policy of the British nation, require that effectual provision should be made, at all times for the good government of the British Empire in India, and for the prosperity and happiness of the people inhabiting the same ; and many wise and salutary regulations have accordingly been enacted from time to time, by the Governor-General in Council, with the *benevolent intent and purpose of administering to the said people their own laws, usages and customs in the*

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Early Anglo-Indian administrators and indigenous laws.

Regulation IX of 1800 Preamble.

(1) Harrington's *Analysis* Vol. I. p. 11.

(2) Halhed's *Gentoo Code*. Hamilton's *Hedaya*.

(3) See the *Instructions to the Supervisors* given in 1769. See Colebrooke's *Digest* p 174

Lec. III.

mild and benignant spirit of the British constitution, and whereas it is indispensably necessary, with a view to secure the due execution and administration of the said wise. . . regulations The Most Noble Richard Marquis Wellesley .. . Governor-General in Council, deeming the establishment of such an institution, and system of discipline, education and study, to be requisite for the good government and stability of the British Empire in India, His Lordship in Council hath therefore enacted as follows ”

Thus we find that even in India the unconscious thought of the average inhabitant of the country, represented by the laws and customs of the country influenced the making and moulding of laws. True, it was the constructive intellect of the Anglo-Indian legislators (who did not think it wise to do away with the indigenous laws of the country and to introduce the rules of English law indiscriminately) and not that of the people of the country, that framed the early Anglo-Indian Codes, yet the making and moulding of these codes were the result of the joint-action of the constructive intellect of the Anglo-Indian legislators and the unconscious thought of the average inhabitants of this country, as represented by their laws and customs. The two guiding principles mentioned above do still exercise great influence over the legislative activity of the Government of the country.

Subject-matter
of this lecture.

Now, in this lecture I shall *first of all* show how the condition of people influenced the Regulation Codes relating to the constitution of civil and revenue courts, and in doing so I shall shortly trace the origin and development of these courts and show how their constitution was changed from time to time. *Secondly* I shall show how the condition of the people at the end of the eighteenth century affected the penal law, especially its provisions against *dacoity*. *Thirdly* I shall show how it has become necessary to have local and special codes and to save the usages and customs of the people in modern Anglo-Indian Codes.

I. Civil and
Revenue Courts in
Bengal—their
separation,
amalgamation
and separation.

In 1765 when the Dewannee authority was granted to the East India Company by the Moghul Emperor, the districts of Burdwan, Midnapur, Chittagong and Twenty-four Pargannahs were already under the management of the servants of the Company. At that time it was not thought advisable to vest the immediate administration of the revenue or of civil and criminal justice, in the European officers of the Company and so a *Naib* or Deputy Dewan resident at Murshidabad, under the control of the European Resident

there, and a *Naib* or Deputy Dewan for Behar under the control of the European Chief at Patna were appointed to collect the revenue, without making any change in the former system of collection. This system lasted till 1769 when Supervisors were appointed to superintend, in subordination to the Resident, the native officers employed throughout the country in collecting the revenue and administering justice. In 1771 the *Naib* Dewans at Murshidabad and Patna were removed and the Supervisors were styled "Collectors." In 1772 according to the provisions of the Plan of Warren Hastings, *Moffusil Dewannee Adawlut*, or provincial courts of civil jurisdiction under the superintendence of the Collectors were established in each district. A *Sudder Dewanny Adawlut* was also established at the same time, under the superintendence of three or more members of the Council, to hear appeals from the Provincial Courts, in causes exceeding 500 rupees. In 1774 an alteration took place in the constitution of the *moffusil Dewannee Adawlut*, by the recall of the Collectors, and appointment of Provincial Councils for the divisions of Calcutta, Burdwan, Dacca, Murshidabad, Dinajpur and Patna. The administration of civil justice was vested in the Council at large, but exercised by one of the members in rotation. This plan continued in force till the 28th March, 1780, when the Governor-General and Council resolved, that, for the more effectual and regular administration of justice, district courts of *Dewannee Adawlut* should be established in the fixed divisions above-named, to be independent of the Provincial Council and to take cognizance of all claims of inheritance to zemindaries, talookdaries, or other real property and all matters of personal property. But the Provincial Councils were to try and decide all causes having relation to the public revenue, as well as all demands of landlords and farmers or their under-tenants, for arrears of rent, and all complaints from *ryots* and tenants of every description, for irregular and undue exactions of rent or revenue. In the year 1787 it was resolved that with the exception of the three courts established in Murshidabad, Patna and Dacca (which were to continue independent of any collectorship for the decision of civil causes arising within the limits of those cities) the office of the judge of the several *Moffusil* courts, should be held by the person who had the charge of the revenue. A revised Code of Judicial Regulation (in 91 Sections) adapted to this change of system, and dated the 27th June, 1787 was at the same time printed and published.

LEC III.

Supervisors

Collectors.

Recall of
Collectors
1774Divisional
Courts of
Dewannee
Adawlut.Provincial Court
Judges became
the Collectors.
1787.Revised Code
of Judicial
Regulation.

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Reasons for
the changeRemarks of
Sir John Shore.

The reason given for re-investing the Collectors with the superintendence of courts of *Moffusil Dewannee Adaw-luts* (a system which had been discontinued in 1780 "for the more regular administration of justice in the country civil courts of these provinces") was "the greater simplicity, energy, justice, and economy, expected to be the result of the measure" The following objections had also been stated, against the system established in 1780 and 1781, by Sir John Shore (Lord Teignmouth) (1) *viz*, "People accustomed to a despotic authority should look to one master. It is impossible to draw a line between the revenue and judicial departments in such a manner as to prevent their clashing; and in this case, either the revenue must suffer, or the administration of justice must be suspended. The present Regulations define the objects of the two jurisdictions with clearness and precision; yet they continually clash in practice. complaints are so blended, that it is often impossible to determine to which tribunal they belong and that there has not been more confusion than has actually happened, is owing to the discretion of those who have been entrusted with the administration of justice. It may be possible, in the course of time, to induce the natives to pay their rents with regularity, and without compulsion, but this is not the case at present. If any force is offered, a complaint is made in a Court of Justice, and whether true or false, a temporary protection is given to the complainant, who is released from the demands upon him; to realize them afterwards is no easy matter. In all demands for revenues, or in summonses to cause the attendance of parties at the *Adaw-luts*, peons are employed, and very often the peons of the two tribunals meet at the house of the same man, where the property of his person is contested, and he is obliged to pay both parties"

Comments on
above.

Harington.

In commenting on these remarks Harington says (2) "But admitting that a system, resting in the hands of one person the powers of Judge and Magistrate, and the authority necessarily entrusted to the officers employed in the collection of the public revenue, may be more simple than a system which divides these powers between distinct

(1) Sir John Shore's "Remarks on the mode of administering justice to the natives in Bengal, and in the collection of the revenues" delivered to Sir J Macpherson in January, 1782, and recorded by the latter on the Bengal Revenue Consultation of 29th May, 1785. It appears from Sir J Macpherson's minute, recorded at the same time that those remarks were written for his personal information. See Harington's *Analysis* Vol. I. p. 34

(2) Harington's *Analysis* Vol. I. 35, 56.

persons and authorities ; it is manifestly too extensive a trust ; and if higher degree of justice be rendered, in any instance, by an administration of the former system, it must proceed from the personal character and qualifications of the individuals employed to administer it. These, for a time, might check the natural tendency of such an accumulation of power to the abuse of it ; but could not be relied upon, as a fixed principle, to support any permanent system of justice . . . Nor was this the only objection to the union of the functions of Judge and Magistrate with those of the Collector. In the latter capacity his measures and conduct were continually open to inspection. The monthly reports made by him of the state of his collection drew the constant attention of the Board of Revenue, and of Government, to his success or failure in realizing the public dues ; and commendation or censure was the frequent result ; whilst at the same time his diligence or neglect in the decision of causes ; wherein the Government had no immediate interest, was seldom brought into public notice ; and when observed the multiplicity of duties he had to perform might be a real plea of justification for any delay in the administration of justice. Under these circumstances, it was natural and unavoidable, that the collection of the revenue, on which the Collector's credit and promotion in service might depend, should be considered his primary duty ; and that his duties as Judge and Magistrate should be regarded as subordinate. . . . The making of all complaints of exaction or oppression, in the collection of the revenue and land rents, exclusively cognizable by the Collector of the revenue, must also in frequent instances, have stopped the course of justice ; and in others, have subjected the Collector's judgment, however just, to suspicion of its impartiality from the known interest he had in realizing the revenue under his charge ; and consequently in supporting the landholders and farmers, from whom it was to be received, in the enforcement of their demands upon their under-renters and tenants."

I.E.C. III.

Too extensive
a trust

The best answer to the remark of Lord Teignmouth that people long accustomed to a despotic authority should look to one master, was given by Lord Cornwallis. In proposing the separation of the functions of Judge and Collector, Lord Cornwallis remarked "The proposed arrangements only aim at insuring a general obedience to the regulations, which we may institute ; and at the same time impose some check upon ourselves against passing such as may

LÆC III.

Lord Cornwallis

ultimately prove detrimental to our own interests, as well as the prosperity of the country. The natives have been accustomed to despotic rule from time immemorial, and are well-acquainted with the miseries of their own tyrannic administrations. When they have experienced the blessings of good government there can be no doubt to which of the two they will give the preference. We may therefore be assured that the happiness of the people, and the prosperity of the country, is the firmest basis on which we can build our political security. When the landholders find themselves in the possession of profitable estates; the merchants and manufacturers in the enjoyment of a lucrative commerce; and all the descriptions of people protected in the free exercise of their religion; both the numerous race of the long oppressed Hindus, and their oppressors the Mahomedans, will equally deprecate the change of a government under which they have acquired, and under which alone they can hope to enjoy, these inestimable advantages."

Impressed by these considerations, by a sense of the radical defects, above stated, in the constitution of the provincial courts of Judicature, which subsisted at the commencement of 1793; and by the many and powerful reasons, moral and political, which called for such an administration of justice as by securing the private rights of every description of persons, should promote the public advantage, and general prosperity of the country, Marquis of Cornwallis determined to vest the collection of revenue and administration of justice, in separate officers, to abolish the *mâl Adawluts*, or revenue courts, and to withdraw from the Collectors of revenue all judicial powers; transferring the cognizance of all causes hitherto tried by the revenue officers to the courts of *Dewannee Adawluts* (1)

II. Criminal law
& condition of
people.

Dacoity.

Rule 35 of the Plan of 1772 laid down a proposition of criminal substantive law and it is in fact the precursor of the Indian Penal Code. It runs as follows (2) — "That, whereas the peace of this country hath, for some years past, been greatly disturbed by bands of dacoits, who not only infest the high roads, but often plunder whole villages, burning the houses and murdering the inhabitants; whereas these abandoned out-laws have hitherto found means to elude every attempt which the vigilance of government hath put in force, for detecting and bringing such atrocious crimi-

(1) Harington's *Analysis*, Vol. I. 38-40 Preamble of Reg II of 1793

(2) Colebrooke's *Supplement*. 13, 114. Harington's *Analysis*, pp. 346, 347.

nals to justice, by the secrecy of their haunts, and the wild state of the districts, which are most subject to their incursions ; it becomes the indispensable duty of Government to try most rigorous means, since experience has proved every lenient and ordinary remedy to be ineffectual. That it be therefore resolved, that every such criminal, on conviction, shall be carried to the village to which he belongs, and be there executed, for a terror and example to others ; and for the further prevention of such abominable practices, that the village, of which he is an inhabitant, shall be fined ; according to the enormity of the crime ; and each inhabitant according to his substance ; and that the family of the criminal shall become the slaves of the State, and be disposed of, for the general benefit and convenience of the people, according to the discretion of the Government "

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Rule 35 of Plan of Warren Hastings

This Rule is peculiar in its form—it has a preamble, contains an incomplete definition of *ducoity* and has a punishment clause, punishment was awarded not only to the criminal individually, but also to the members of his family and his co-villagers. The criminal was executed, the members of his family became slaves of the State, and those who lived in the same village with the criminal were fined. To justify such unusual punishment the Circuit Committee wrote "We have judged it necessary, to add to the Regulations, with respect to the Court of *Phoujdarry*, a proposal for the suppression and extirpation of *Dacoits*, which will appear to be dictated by a spirit of rigour and violence, very different from the caution and lenity of our other propositions ; as it in some respect involves the innocent with the guilty. We wish a milder expedient could be suggested, but we much fear that this evil has acquired a great degree of its strength, from the tenderness and moderation which our Government has exercised towards these banditti, since it has interfered in the internal protection of the provinces. We confess, that the means which we propose, can in no wise be reconcilable to the spirit of our own constitution ; but till that of Bengal shall attain the same perfection, no conclusion can be drawn from the English law, that can be properly applied to the manners or state of this country. The dacoits of Bengal are not like the robbers in England, individuals driven to such desperate courses by sudden want. they are robbers by profession, and even by birth ; they are formed into regular communities ; and their families subsist by the spoils which they bring home to them : they are all, therefore, alike, criminal

Opinion of the Circuit Committee.

Condition of the people and why such drastic measures were proposed.

I. EC. III.

wretches, who have placed themselves in a state of declared war with Government, and are therefore wholly excluded from every benefit of its laws. We have many instances of their meeting death with the greatest insensibility ; it loses therefore its effect as an example . but when executed in all the forms and terrors of law, in the midst of the neighbours and relations of the criminal ; when these are treated as accessories to his guilt, and his family deprived of their liberty, and separated for ever from each other ; every passion, which before served as an incentive to guilt, now becomes subservient to the purposes of society, by turning them from a vocation, in which all they hold dear, beside life, becomes forfeited by their conviction . at the same time, their families instead of being lost to the community, are made useful members of it, by being adopted into those of the more civilized inhabitants The ideas of slavery, borrowed from our American Colonies, will make every modification of it appear, in the eyes of our own countrymen in England, a horrible evil. But it is far otherwise in this country, here slaves are treated as the children of the families to which they belong ; and often acquire a much happier state, by their slavery than they could have hoped for by the enjoyment of liberty ; so that, in effect the apparent rigour, thus exercised on the children of convicted robbers, will be no more than a change of condition, by which they will be no sufferers ; though it will operate as a warning to others, and is the only means, which we can imagine, capable of dissipating these desperate and abandoned societies, which subsist on the distress of the general community” (1).

Slavery as a
punishment
Views of Sir
William Jones.

Against this view of Warren Hastings about slavery we have the views of Sir William Jones. Sir William Jones, in a charge to the grand jury at Calcutta, in 1785, described the miseries of slavery existing at that period, even in the metropolis of British India in the following terms (2) —“I am assured, from evidence which, though not all judicially taken, has the strongest hold on my belief, that the condition of slaves within our jurisdiction is, beyond imagination, deplorable ; and that cruelties are daily practised on them, chiefly on those of the tenderest age and the weaker sex, which, if it would not give me pain to repeat, and you to hear, yet, for the honour of human nature, I should

(1) *Letter from the Committee of Circuit to the Council at Calcutta*, dated 15th August, 1772. Colebrooke's *Supplement* pp 13, 114

(2) See *Lewis' Life of Dr. John Thomas* p. 19.

forbear to particularize. If I except the English from this L.E.C. III. censure, it is not through partial affection to my own countrymen, but because my information relates chiefly to people of other nations, who likewise call themselves Christians. Hardly a man or a woman exists in a corner of this populous town, who hath not at least one slave child either purchased at a trifling price, or saved perhaps, from a death that might have been fortunate, for a life that seldom fails of being miserable. Many of you, I presume, have seen large boats filled with such children, coming down the river for open sale at Calcutta, nor can you be ignorant that most of them were stolen from their parents, or bought, perhaps, for a measure of rice in a time of scarcity."

It was not till 1843 that the sale of the British Indian subjects in execution of a decree, &c., as slaves was prohibited (1).

Thus we find the condition of the people of the country influencing the legislators to make special provisions of law to meet particular exigencies of the time. In this connection I shall make mention of another Act which has been passed to put a stop to the depredations of what are called the Criminal Tribes of India. The fact that the Government of India has thought it fit to pass such an Act as the *Criminal Tribes Act* may suggest to some people that the people of India are a particularly criminal people. But such a suggestion is clearly unfounded, as Sir James Stephen himself stated when introducing the First Criminal Tribes Bill in 1870. He said that he was glad that as far as his experience had gone, he did not think that the Natives of India were by any means a peculiarly criminal people. He thought that Bombay and Calcutta might, in this respect, compare by no means disadvantageously with Liverpool and Birmingham and he was informed that many parts of the Mofussil produced far less crime in proportion to their population than parts of England. There were, however, certain parts of India, and in particular the North-Western Provinces, the Punjab and Oudh, in which crime was carried on in a manner altogether dissimilar to anything which was known in Europe. In certain parts of the country there were tribes of criminals who carried on theft and robbery as regularly, as systematically and with as little sense of criminality as if they were following the most legitimate pursuits e. g. *Burwar* tribes of Gonda District, *Méénas*

Criminal
Tribes Act

(1) Act V of 1843.

L.R.C. III.

Criminal
Tribes Act.

Act III of 1911.

of Gurgaon and Shajanpur (1). Such was the state of things with which the Legislature had to deal in 1870. The proceedings of some of these criminal tribes had this leading point in common that they had during part of the year a fixed residence and during other parts of it they wandered about for criminal purposes. The remedy adopted by the Criminal Tribes Act of 1871 was to put the tribes under supervision in such a manner as to confine them to their houses. The Act applied to all criminal tribes, whether they had or had not a fixed place of residence. The Act of 1871 was amended from time to time and was finally repealed by Act III of 1911. The present Act owes its origin to the Police Commission who in their report pointed out the inadequacy of the old Act in certain respects and made proposals for its improvement. The criminal tribes in India may be divided roughly into three classes. In the *first place*, there are tribes who though originally criminal have now settled down to honest occupations, although some sections of them and many individuals still live by crime e.g. the *Kols*, *Bhils*, and *Ramesis*. It would be unjust to class them as wholly criminal, yet in Poona, if you don't pay a *Ramesi* watchman you stand a chance of having your house looted. *Secondly*, there are tribes who have settled abodes, and generally some ostensible occupation, but who periodically proceed on raids, often at a great distance from their homes, and live solely on their ill-gotten gains. *Thirdly*, there are the vagrant gipsy-like classes who roam over a great extent of country and commit depredations whenever opportunity offers. They are here to-day and gone tomorrow. In Northern India they are the terror of the countryside. It is obvious that there must be different methods of dealing with these different classes. The present Act (III of 1911) provides a means of dealing with the special circumstances of each case. The first step under this Act is to notify a tribe, gang or class of persons as a criminal tribe. Thereafter the members of that tribe may be required to register themselves to allow their *finger prints* to be taken and to report absence and changes of residence. Provisions for registration existed in the old Act of 1871, although at the time that Act was passed the system of finger print was unknown. Then

(1) Mr. Mavne sometimes Commissioner of Allahabad and the head of the Police of the N. W. Provinces has given a list of no less than 29 tribes who lived in N. W. Provinces and carried on criminal pursuits of various kinds. See *Abstracts of Proceedings* for 1870 p. 422. for 1871. p. 652.

again in the case of more settled tribes the provisions for registration alone are sufficient. Where registration is insufficient, recourse may be had to one of two courses—either to the restriction of the movements of the tribes within certain specified areas (this provision in Act III of 1911 is new)—or to the measure of settlement of a tribe in a place of residence. In this connection it should be noted that the attempts of the Salvation Army in the Punjab to turn the criminal tribes of the Punjab into peaceful inhabitants have been, as testified by the Government of the Punjab, very successful. We should also notice here the most important provision of Act III of 1911 viz., that the validity of no notification under §§ 3, 12, 13 of the Act can be questioned in a Court of Justice.

It is creed, not race nor allegiance by which men are divided and classified in British India. The different creeds have their different systems of law and different customs. There is practically no means by which these different creeds may coalesce into each other and separate they have remained so long. Existence of so many different self-containing creeds with different systems of law is a great drawback to codification. "The legislators of the Hindus were also their priests, and it is in consequence of this circumstance that the Hindu Law, at least that portion of it which relates to inheritance, is placed entirely on the basis of Hindu religion. The institution of marriage is still regarded by the Hindus as a sacrament" (1). The fact of Hindu law being mixed up with Hindu religion makes the question of any reform or change of Hindu law, a question of Hindu religion, with the result that the British Indian legislators are always unwilling to touch the personal laws of the Hindus. These remarks also apply, more or less to the personal laws of the Mahomedans. Rule 23 of the Plan of Warren Hastings, as mentioned before, reserved their personal laws to the Natives of India (2). Subsequently, when the Govern-

Condition of people of India unfavourable to codification.

Saving of the personal laws of the Hindus and Mahomedans.

(1) *Moniam v. Kenny Kolutany* (1880) 7 I A 155, 140 (1873) 13 B L R. 27, 28.

(2) "To a steady pursuance of this great maxim (i.e. a well-timed toleration in matters of religion, and adoption of such original institutes of the country, as do not clash with the laws or interests of the conquerors) much of the success of the Romans may be attributed, who not only allowed to their foreign subjects the free exercise of their own religion, and the administration of their own civil jurisdiction, but sometimes by a policy still more flattering, even naturalized such parts of the mythology of the conquered, as were in any respect compatible with their own system." Halhed's *Genioo Code. Translator's Preface*. IX. With a view to the same political advantages and observance of so striking an example that

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General and Council were invested by Parliament with the power of making Regulations, the provisions and exact words of the 23rd Rule, mentioned above, were introduced into the Regulation passed by the Government on the 17th April, 1780 (1). Section 27 of the Regulation of 17th April, 1780 was re-enacted in the following year in the Revised Code (Bengal Judicial Regulation VI of 1781 §37) with the addition of the word "succession". This provision was then embodied in §15 of Regulation IV of 1793, which was extended to Benares and the Upper Provinces by §3 of Regulation VIII of 1795 and §16 of Regulation III of 1803 of the Bengal Code.

Supreme Court

The 13th Geo III c 63 (passed in 1773 and establishing the Supreme Court at Fort William in Bengal) and the Charter of the Supreme Court contained no clause specially denoting the law to be administered to the Indians. But §17 of the Declaratory Act of 1781 (21 Geo III c.70 Passed for explaining and defining the powers and jurisdiction of the Supreme Court at Fort Wilham) enacted that, in disputes between the native inhabitants of Calcutta, "their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party, shall be determined in the case of the Mahomedans by the laws and usages of Mahomedans, and in the case of Gentoos by the laws and usages of Gentoos, and where only one of the parties shall be Mahomedan or Gentoos, by the laws and usages of the defendant. Section 18 of the same statute enacted "in order that regard should be had to the civil and religious usages of the said natives, . . . the rights and authorities of fathers of families and masters of families, according as the same might have been exercised by the Gentoos or Mahomedan law, shall be preserved to them respectively within their said families (2); nor shall any act done in consequence of the rule and law of caste, respecting the members of the said families only, be held and adjudged a crime, although the same may not be held justifiable by the law of England" (3).

Paternal authority

Halhed's *Code of Gentoos Laws* was compiled. See also Verelst's *State of Bengal* Ch V and Lord Teignmouth's "Remarks on the mode of administering justice to the natives of Bengal, and on the collection of the revenue," printed in the 6th Volume of "India Papers." 1787

(1) Section 27 of the *Judicial Regulation* of 17th April, 1780.

(2) *The Guardians and Wards Act* (VIII of 1890) has changed the law on the subject of Guardianship and courts can deprive parents of their right of Guardianship if it is necessary for the welfare of the minor

(3) The Indian Penal Code has changed the law and makes no special provisions for such cases.

This reservation of the native laws to Hindus and Mahomedans was extended to Madras and Bombay by sections 12 and 13 of the 37th Geo III c.142, passed in 1767, under which the Recorders' Courts at those Presidencies were established. By 39 & 40 Geo III c 79 §5 and 1 Geo IV. c 71 §9 all powers and authorities granted to the said Recorders' Courts at Madras and Bombay were transferred to the Supreme Courts at those Presidencies established respectively under the said statutes. Thus we see that though the actual administration of the country was taken up by the East India Company, the social fabric was very little disturbed, the land customs and the rules of inheritance were respected and the minor officers, with whom chiefly the peasantry came in contact, continued to be the natives of the country. At the present time the Charters of the High Courts (1) and the Civil Courts Acts (2) have also reserved their own laws to the Hindus, Mahomedans and Buckhists in British India

L.F.C. III.

Charters of the
High Courts
Civil Courts Acts.

In the Presidency Small Cause Courts all questions other than questions relating to procedure or practice, which arise in suits or other proceedings, are dealt with and determined according to the law for the time being administered by the High Court in the exercise of its ordinary original civil jurisdiction (3).

The social, moral and material condition of the people of India is so different in different parts of the country that it is sometimes necessary to restrict the application of the Anglo-Indian Codes

Such restriction may be either (I) *personal* i.e. making the provisions of some of these codes applicable only to a

(1) *Calcutta High Court*. Clause 19 of the Letters Patent 1865, Clause 18 of the Letters Patent of 1862 and 21 Geo. III c 70 §17.

Bombay and Madras. Clause 19 of the Letters Patent of 1865. Clause 18 of the Letters Patent of 1862; 4 Geo IV. c 71 §9, 39 and 40 Geo. III c 79 §5, 37 Geo III. c 112 §§12, 13.

(2) *The Bengal, United Provinces and Assam Civil Courts Act* (XII of 1887) §37.

Madras Civil Courts Act. (III of 1873) §16.

Bombay Regulation IV of 1827 §26. This section has been declared, by the *Laws Local Extent Act* (XV of 1874) §5 and by Notification under the *Schedule Districts Act* (XIV of 1874) to be in force in the whole of the Bombay Presidency and the districts of Thar and Parkar and the Upper Sindh Frontier.

The Punjab Laws Act (IV of 1872) §5.

The N. W. Frontier Provinces Law and Justice Regulation (Reg VII of 1901).

Burma Laws Act (XIII of 1898) §13.

(3) *The Presidency Small Cause Court Act* (XV of 1882) §16 See Lectures on Progress of Codification, Contract. Madhub v. Rajcoomar (1874) 14 B.L.R. 76, 84.

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Restricted application of the Anglo-Indian Codes

(I) Personal.

(II) Local.

(I) Personal.

(A) Succession Act

certain class of people or (II) *local* i.e. a code may be applicable only in a certain particular locality. As examples of restricted personal application of the Anglo-Indian Codes we have, amongst other cases (A) *The Indian Succession Act*, which is applicable only to (i) Europeans by birth or descent domiciled in British India (ii) The East Indians (iii) Jews. Except in Aden where they have been exempted by Notification under § 332. (*The Gazette of India*, 1886, p. 707.) (iv) Armenians (v) Parsees. So far as testamentary succession is concerned Act XXI of 1865 regulates intestate succession amongst the Parsees. (vi) The Indian Christians and their descendants. By Act VII of 1901 the Indian Christians had been exempted from §§ 190 and 239 of the Succession Act. These two sections have not been incorporated either in the Probate and Administration Act or in the Hindu Wills Act. (vii) Natives of India other than those comprised in the terms "Hindu, Mahomedan and Buddhist" and not excluded under § 332 of the Act. The Brahmos (1) and Sikhs (2) are governed by Hindu law of succession. It has been held by their Lordships of the Privy Council (3) that a Hindu does not cease to be such within the meaning of the Succession Act § 331 and Probate and Administration Act § 2 by becoming a member of the Brahmo Somaj or by occasional lapses from orthodox Hindu practice, so long as he is not otherwise separated from the religious communion in which he was born. (viii) All Europeans in India, not having an Indian domicile so far as succession to immovable property is concerned. The Indian Succession Act is inapplicable to Hindus and Mahomedans except those provisions which have been incorporated in the Probate and Administration Act and the Hindu Wills Act. The title "The Indian Succession Act" is really a misnomer. Under Section 332 of the Succession Act the Governor-General of India in Council have exempted the following from the operation of this Act.—

(a) The Khasias and Syntengs in Assam, as having special laws of inheritance incompatible with the provisions of this Act. *The Gazette of India*, 1877, p. 512.

(b) The Indian Christians in the Province of Coorg retrospectively from the 16th March, 1865. *The Gazette of India*, July 25, 1868, p. 1094.

(1) *Kusum Kumari v. Satyaranjan* (1903) 30 C 999.

(2) *Rani Bhagwan v. Jogendra* (1903) 30 I.A. 249. s.c. 31 C.11, 31.

(3) *Rani Bhagwan v. Jogendra*. (1903) 30 I.A. 249.

(c) The Jews in Aden, as being governed by Levitical laws. *The Gazette of India*, 1886, p. 707. LEC. III.

The *Trustees Act* (XXVII of 1866. Based mainly on 13 & 14 Vic. c.60 and 15 & 16 Vic. c 55) This Act was passed to consolidate and amend the laws relating to the conveyance and transfer of movable and immovable property in British India vested in the mortgagees and trustees, in cases to which English law is applicable

(B) The Trustees Act.

The *Trustees and Mortgagees Powers Act* (XXVIII of 1866 based on 22 and 23 Vic. c.35 and 23 and 24 Vic c 145 which has been repealed by 44 and 45 Vic. c.41 §71 and 45 and 46 Vic. c 38 §64) This Act was passed to give to trustees, mortgagees and others, in cases to which English law is applicable, certain powers commonly inserted in settlements, mortgages and wills and to amend the law of property and relieve trustees. In the matter of *Indenture of Nil-money Dey Sarkar* (1) it has been held that this Act is applicable to a trust which has been created in form valid under the English law, and in which the trustee and the cestui que trust were all Hindus, if such trust does not violate the provisions of Hindu Law. But this case has been disented from in subsequent cases

(C) Trustees and Mortgagees Powers Act

Married Women's Property Act (III of 1874) is not applicable to any married woman who at the time of her marriage professed the Hindu, Mahomedan, Buddhist, Sikh or Jaina religion, or whose husband, at the time of such marriage, professed any of those religions. The Governor-General in Council may by order exempt from the operation of all or any of the provisions of this Act, the members of any race, sect or tribe to whom he may consider it impossible or inexpedient to apply such provisions

(D) Married Women's Property Act.

The provisions of the *Indian Divorce Act* (IV of 1869) did not authorize any court to grant any relief under this Act except in cases where the petitioner professed the Christian religion and resided in India at the time of presenting the petition. But the Divorce Act of 1869 as amended by Act X of 1912 authorizes the courts to grant relief under the Act not only in cases where the petitioner professes the Christian religion but also in cases where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded.

(E) The Indian Divorce Act, IV of 1869, X of 1912.

Now, let us deal with the subject of restricted local application of laws. The Provincial Codes contain the laws appli-

(II) Restricted local application.

(1) (1901) 9 C W N. 79.

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Provincial codes

cable only to specified areas, passed either by the local legislature or the Legislative Council of the Governor-General of India. Besides the Acts of the different Local Legislative Councils there are certain Acts of the Governor-General's Legislative Council which apply only to certain specified areas.

(A) Easements Act.

The Indian Easements Act (V of 1882) applied only to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg, but in 1891 this Act was extended to the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governor of N. W. Provinces and the Chief Commissioner of Oudh (now the United Provinces of Agra and Oudh)

(B) Trusts Act

The Indian Trusts Act originally applied to territories respectively administered by the Governor of Madras in Council, the Lieutenant-Governors of the N. W. Provinces (now the United Provinces of Agra and Oudh), and the Punjab, the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam. But subsequently it has been extended (i) to the whole of the Bombay Presidency, including the Scheduled Districts (1).

(1) To the area included within the limits of Rangoon Town as from time to time defined for the purpose of the Lower Burma Courts Act, 1900 (IV of 1900) (2)

(C) Transfer of Property Act. (IV of 1882).

When the *Transfer of Property Act* was passed in 1882 it applied to the whole of British India except the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governor of the Punjab and the Chief Commissioner of British Burma. But subsequently it has been extended (i) to the whole of the territories, other than the Scheduled Districts, under the administration of the Government of Bombay (3).

(ii) To the area included within the limits of Rangoon Town as from time to time defined for the purposes of the Lower Burma Courts Act, 1900, and within the Municipalities of Moulmein, Bassein and Akyab (4). We should also notice here that mortgages by delivery to the creditor or his agent of documents of title to immovable property can be created only in the towns of Calcutta, Madras,

(1) *Bombay Gazette* (1891) Pt I. p. 743. Notification No 4802.

(2) *Burma Gazette*, (1904). Pt. I p. 628.

(3) *Bombay Gazette* (1892). Pt. I. p. 1071.

(4) *Burma Gazette* (1904). Pt I 628, 684.

Bombay, Karachi, Rangoon, Moulmein, Bassein and I.E.C. III. Akyab (1).

There are two important Acts relating to the local extent of the Indian Acts, viz.—*The Scheduled Districts Act* (XIV of 1874) and *Laws Local Extent Act* (XV of 1874). The preamble of the *Scheduled Districts Act*, 1874 runs as follows:—Whereas various parts of British India have never been brought within, or have from time to time been removed from, the operation of the general Acts and Regulations and the jurisdiction of the ordinary courts of Judicature And whereas doubts have arisen in some cases as to which Acts or Regulations are in force in such parts, and in other cases as to what are the boundaries of such parts. And whereas among such parts are the territories specified in the first schedule hereto annexed, and it is expedient to provide readier means than now exist for ascertaining the enactments in force in such territories and the boundaries thereof, and for administering the law therein.

The Scheduled Districts Act.

It is hereby enacted as follows (then follow the different sections of the Act). In this Act the term "Scheduled Districts" means the territories mentioned in the first Schedule annexed to it, and from the date fixed in the resolution next hereinafter mentioned, it shall also include any other territory to which the Secretary of State for India, by resolution in Council, may declare the provisions of the 33rd of Vic. c 3 §1 to be applicable (2) Section 3 deals with the notification of enactments in force in the Scheduled Districts (3).

The Laws Local Extent Act, 1874 was passed (i) to declare the local extent of certain Acts passed by the Governor-General of India in Council, the Legislative Council of India and the Council of the Governor-General of India assembled for the purpose of making Laws and Regulations.

The Laws Local Extent Act.

(ii) To consolidate the laws relating to the local extent of certain Acts and Regulations in the Presidencies of Fort St. George and Bombay, and in the Lower and the North-Western Provinces of the Presidency of Fort William in Bengal.

The first Schedule annexed to this Act contains the Acts

(1) *Transfer of Property Act*, §59.

(2) For the list of such territories see Ap. B *Uncollected General Acts of the Governor-General in Council*, 4th Ed. Vol. II. pp. 454, 455.

(3) For such notifications see Ap. A. *The Unrepealed General Acts of the Governor-General of India in Council* Vol. II pp. 451-453, 4th Ed.

LEC. III. in force throughout the whole of British India, except the Scheduled Districts.

- The first Schedule attached to the *Scheduled Districts Act* (XIV of 1874) contains the names of the scheduled districts of the different Provinces of British India (1)
- Reg III of 1877. *Ajmere Laws Regulation* (Reg. III. of 1877) §3 refers to the Regulations etc. in force in Ajmere and Merwara (2).
- Reg. I. of 1894. *Angul District Regulation* (Reg. I of 1894) §3 refers to the laws in force in the District of Angul (3).
- Reg IX of 1874. *Arakan Hill District Laws Regulation* (IX of 1874) §3 refers to the Acts and Regulations in force in the Hill district of Arakan (4)
- Reg. I of 1890. *The British Beluchistan Laws Regulation* §3 refers to the laws in force in British Beluchistan (5)
- Act XIII of 1898. *Burma Laws Act* §4 refers to the Regulations of the Bengal Code and the Acts of the Governor-General in Council in force in Burma (6).
- Act XX of 1875. *The Central Provinces Laws Act* §3 refers to the enactments in force in the Central Provinces (7).
- Reg. V of 1896 *Chin Hills Regulation*, 1896, §3 declares the laws applicable to Chin Hills (8).
- Reg I of 1895. *Kachin Hill Tribes Regulation* of 1895, §3 refers to the laws applicable to the Hill tribes in Kachin Hill tracts (9).
- Act XVIII of 1876 *Oudh Laws Act*, Pt. II, deals with the general laws administered in Oudh (10).

(1)	Sch I Pt I	Scheduled Districts,	Madras
	„ Pt II.	Do.	Bombay.
	„ Pt III.	Do.	Bengal
	„ Pt IV	Do.	The United Provinces
	„ Pt. V	Do.	The Punjab.
	„ Pt VI.	Do.	The Central Provinces.
	„ Pt. VII	Do.	The Chief Commissioner of Coorg.
	„ Pt. VIII	Do	The Chief Commissioner Andaman & Nicobar Islands
	„ Pt. IX	Do.	The Chief Commissioner of Ajmere & Merwara
	„ Pt. X.	Do.	The Chief Commissioner of Assam
	„ Pt XI	Do.	The Hill Tracts of Arakan.
	„ Pt. XII.	Do.	The Pargana of Manpur.

(2) *Ajmere Code*. 3rd Ed. p. 704.

(3) *Bengal Code*. 3rd Ed. Vol. I. p. 257.

(4) Reg. IX of 1874. *Burma Code*. 4th Ed. p. 200.

(5) Reg I of 1890 §3. *Beluchistan Code*, (1900 Ed.) p. 60.

(6) Act XIII of 1898. *Burma Code* 4th Ed. p. 129

(7) Act XX of 1875. *The Central Provinces Code*. 3rd Ed. p. 61.

(8) Reg. V of 1896. *Burma Code*. 4th Ed. p. 285.

(9) Reg. I of 1895. *Burma Code*. 4th Ed. p. 253.

(10) Act XVIII of 1876. *The United Provinces Code*. 4th Ed.

The Punjab Laws Act §§3, 39 refer to the Acts and Regulations in force in the Punjab (1). LEC. III.
Act IV of 1872.

Sonthal Parganas Settlement Regulation of 1872, §3 refers to the enactments in force in the Sonthal Parganas (2). Reg. III of 1872 and Reg. V of 1893.

Difference in the condition of people of British India has made the saving of local laws and usages necessary. Thus if we take the most important Anglo-Indian Code, the *Indian Penal Code*, we find that the Legislature in the preamble of the Code, declared that they were about to pass a general Penal Code, and if the preamble and §2 had stood alone the effect of §2 would have been to repeal, by implication at least, all then existing penal enactments; but such repeal by implication had been prevented by §5; the reason for introducing that section being that though the Code was intended to be a general one, it was not thought desirable to make it exhaustive, and hence offences defined by local and special laws were left out of the Code and merely declared to be punishable as theretofore (3). Section 5 of the Penal Code acts as a saving clause. Local and special laws & customs.
Penal Code.

The principle on which Chapter XV of the Indian Penal Code has been framed is a principle on which it would be desirable that all governments should act and from which the British Government in India cannot depart without risking the dissolution of society. There is no country in which the Government has so much to apprehend from religious excitement among the people. Under the Government of India "are placed millions of Mahomedans, of differing sects, but all strongly attached to the fundamental articles of the Mahomedan creed, and tens of millions of Hindus, strongly attached to doctrines and rites which Christians and Mahomedans join in reprobating. Such a state of things is pregnant with dangers which can only be averted by a firm adherence to the true principles of toleration. On those principles the British Government has hitherto acted with eminent judgment, and with no less eminent success." On those principles, this part of the Penal Code has been framed "We have provided" say the framers of the Indian Penal Code "a punishment of great severity for the intentional destroying or defiling of places of worship, or of objects held sacred to any class of persons. No offence

(1) Act IV of 1872 *The Punjab Code*. 3rd Ed. p 63.

(2) Reg. III of 1872 and Reg V of 1903 (*Sonthal Parganas Justice Regulation, Civil and Criminal*). *Bengal Code*, 3rd Ed. Vol. I. pp. 293, 325, 333

(3) *Madras High Court Rulings*. 3 Mad. H.C.R. Ap. XI, XVII, XXI.

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Ch XV Indian
Penal Code.

Dhurna and
Traga.

Sec 292 Indian
Penal Code.
Sale of obscene
books.

in the whole Code is so likely to lead to tumult, to sanguinary outrage, and even to armed insurrection. The slaughter of a cow in a sacred place at Benares in 1809 caused violent tumult, attended with considerable loss of life. The pollution of a mosque at Bangalore was attended with consequences still more lamentable and alarming. We have therefore empowered the courts in cases of this description, to pass a very severe sentence on the offender" (1). In spite of these rigorous provisions religious fanaticism sometimes flares up in British India with consequent loss of life and property, and it is certain that if these provisions were not so severe things would have been still worse. This chapter as originally drafted contained clauses rendering punishable the intentional depriving of a Hindu of his caste by assault or by deception (2) but they were afterwards struck out, as the remedy by civil suit was considered sufficient. This Chapter also contained a Clause (3) intended to prevent such practices as *Dhurna* and *Traga*. That Clause is now §508 of the Indian Penal Code (4).

In the next place we should notice the exception to §292 of the Indian Penal Code. This section makes the sale, exhibition to public view &c of obscene books, paintings, representation or figures &c criminal, and would have included religious sculptures, paintings and engravings if there was no exception to the rule contained in this section. The exception to this section saves such books etc. The reason why religious books are not included within this section is that the tendency of religious publication is not to deprave or corrupt the morals of people, and therefore, a religious work is not obscene within the meaning of section 292. But if the objectionable passages contained in a religious book are extracted and printed separately, and such passages deal with matters which are to be judged by the standard of human conduct, for instance, where they relate to immoral acts of human beings, and the tendency of such publication is to deprave and corrupt those whose minds are open to immoral influences, such publication may not be justified on the ground that the passages formed part of a religious book (5).

(1) See Note J. attached to the first Draft Penal Code by the 1st. Indian Law Commission.

(2) Clauses 284-286 of the First Draft Indian Penal Code

(3) Clause 283 of the First Draft Indian Penal Code.

(4) These practices were punishable by Beng. Reg. XXI of 1795 and Reg. VII of 1820 and Bom Reg. XIV of 1827.

(5) *Kherode v. Emp* (1911) 39C 377, 389.

In incorporating chapter XX into the Indian Penal Code, the Anglo-Indian legislators were not influenced by the condition of the native societies only, but also by that of the European communities "As this part of the law" says Lord Macaulay (1) "in which the English inhabitants of India are peculiarly interested, and which we have framed on principles widely different from those on which the English law on the same subject is framed, we think it necessary to offer some explanation The act which in the English Law is designated as bigamy is always an immoral act. But it may be one of the most serious crimes that can be committed. It may be attended with circumstances which may excuse though they cannot justify it

LEC. III.

Offences relating
to marriage
Ch. XX. Indian
Penal Code.

"The married man who, by passing himself off as unmarried, induces a modest woman to become, as she thinks, his wife, but in reality his concubine, and the mother of an illegitimate issue, is guilty of one of the most cruel frauds that can be conceived Such a man we would punish with exemplary severity

"But suppose that a person arrives from England, and pays attentions to one of his countrywomen at Calcutta. She refuses to listen to him on any other terms than those of marriage. He candidly owns that he is already married. She still presses him to go through the ceremony with her. She represents to him that if they live together without being married she shall be an outcast from society, that nobody in India knows that he has a wife (2), that he may very likely never fall in with his wife again, and that she is ready to take the risk The lover accordingly agrees to go through the forms of marriage It cannot be disputed that there is an immense difference between these two cases. Indeed, in the second case the man can hardly be said to have injured any individual in such a manner as calls for legal punishment

The only party injured is society, which has undoubtedly a deep interest in the sacredness of the matrimonial contract, and which may therefore be justified in punishing those who go through the forms of that contract for the purpose of imposing on the public. The law of England on the subject of bigamy appears to us to be in some cases too severe, and in others too lenient. . . . It makes no distinction between bigamy which produces the most frightful suffering to individuals, and bigamy which

(1) See Note Q to the First Draft Indian Penal Code.

(2) This was in 1837.

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Code
Offences relating
to marriage

produces no suffering to individuals at all. We have proceeded on a different principle. While we admit that the profanation of a ceremony so important to society as that of marriage is a great evil, we cannot but think that evil immensely aggravated when the profanation is made the means of tricking an innocent woman into the most miserable of all situations. We have therefore proposed that a man who deceives a woman into believing herself his lawful wife when he knows that she is not so, and induces her, under that persuasion, to cohabit with him, should be punished with great severity We also propose to punish every person who, with fraudulent intention, goes through the forms of a marriage which he knows to be invalid.

“There are reasons similar, but not exactly the same, for punishing a woman who deceives a man into contracting with her a marriage which she knows to be invalid. For this offence we propose a punishment which, for reasons too obvious to require explanation, is much less severe than that which we have provided for a similar deception practised by a man on a woman ”

This Clause of the framers of the Code (§467 of the 1st draft) was omitted when their draft was revised. But there is nothing in the proceedings of the Legislative Council of India (vol. VI. 1860) to show why this section was omitted. The Indian Penal Code also provides for the punishment of every person who with fraudulent intention, goes through the forms of a marriage which he knows to be invalid.

Adultery.

The Indian Penal Code, as originally framed did not contain the section dealing with the question of adultery (1). The framers of the original draft treated adultery merely as a civil matter. The condition of the people of the country or rather their view of the condition of the people had great deal to do with this view of the framers of the original draft. “We considered” says Lord Macaulay (2) “whether it would be advisable to provide a punishment for adultery, and in order to enable ourselves to come to a right conclusion on this subject we collected facts and opinions from all three Presidencies. The opinions differ widely. But as to the facts there is a remarkable agreement.

“The following positions we consider as fully established: *first*, that the existing laws for the punishment of

(1) Section 497 Indian Penal Code.

(2) See Note Q to First Draft of the Indian Penal Code.

adultery are altogether inefficacious for the purpose of preventing injured husbands of the higher classes from taking the law into their own hands ; *secondly*, that scarcely any native of the higher classes ever has recourse to the courts of law in a case of adultery for redress against either his wife, or her gallant ; *thirdly*, that the husbands who have recourse in cases of adultery to the courts of law are generally poor men whose wives have run away, that these husbands seldom have any delicate feelings about the intrigue, but think themselves injured by the elopement, that they consider their wives as useful members of their small households, that they generally complain not of the wound given to their affections, not of the stain on their honour, but of the loss of a menial whom they cannot easily replace, and that generally their principal object is that the woman may be sent back. The fiction by which seduction is made the subject of an action in the English Courts is, it seems, the real gist of most proceedings for adultery in the Mofussil. The essence of the injury is considered by the sufferer as lying in the "*per quod servitium amisit*" (1). Where the complainant does not ask to have his wife again, he generally demands to be reimbursed for the expenses of his marriage.

I, EC. III.

Adultery.
Draft Indian
Penal Code.

"These things being established it seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes—those whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honour are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances we think it best to treat adultery merely as a civil injury.

"Some who admit that the penal law now existing on the subject is in practice of little or no use, yet think that the Code ought to contain a provision against adultery. They think that such a provision, though inefficacious for the repressing of vice, would be creditable to the Indian Government and that by omitting such a provision we should give a sanction to immorality. They

(1) "Whereby he lost the benefit of her service." This is the allegation in an action for seduction in England.

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Adultery.
Draft Indian
Penal Code.

say that the higher classes of natives consider the existing penal law on the subject as far too lenient, and are unable to understand on what principle adultery is treated with more tenderness than forgery or perjury.

“These arguments have not satisfied us that adultery ought to be made punishable by law. We cannot admit that a Penal Code is by any means to be considered as a body of ethics, that the legislature ought to punish acts merely because those acts are immoral, or that because an act is not punished at all it follows that the legislature considers that act innocent. Many things which are not punishable are morally worse than many things which are punishable.

“That some classes of the natives of India disapprove of the lenity with which adultery is now punished we fully believe, but this in our opinion is a strong argument against punishing adultery at all. There are only two courses which in our opinion can properly be followed with respect to this and other great immoralities. They ought to be punished very severely, or they ought not to be punished at all . . . We have no doubt that the natives would be far less shocked by the total silence of the penal law touching adultery, than by seeing an adulterer sent to prison for a few months while a coiner is imprisoned for fourteen years. Nobody proposes that adultery should be punished with a severity at all proportioned to the misery which it produces in cases where there is a strong affection and a quick sensibility to family honor. We apprehend that among the higher classes in this country nothing short of death would be considered as an expiation for such a wrong. In such a state of society we think it far better that the law should inflict no punishment than that it should inflict a punishment which would be regarded as absurdly and immorally lenient.

“There is yet another consideration which we cannot wholly leave out of sight. Though we well know that the dearest interests of the human race are closely connected with the chastity of women, and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is unhappily very different from that of the women of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attentions of a husband

with several rivals (1). To make laws for punishing the inconstancy of the wife while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking by law an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain operation of education and of time. But while it exists, while it continues to produce its never-failing effects on the happiness and respectability of women, we are not inclined to throw into a scale already too much depressed the additional weight of the penal law. It will be time enough to guard the matrimonial contract by penal sanctions when that contract becomes just, reasonable, and mutually beneficial" (2). But when Lord Macaulay's draft was revised, Section 497 making adultery punishable was introduced into the Penal Code.

Section 494 of the Indian Penal Code dealing with bigamy, applies only to cases where the second marriage is void by reason of its taking place during the life of the first husband or wife. It therefore applies to a Hindu or Mahomedan female, but not to a Hindu or Mahomedan male, since though their law permits a plurality of wives it does not permit a plurality of husbands, except amongst the Nambudari Brahmans of Malabar and Nilgiri Todas.

Before leaving the subject of penal law and condition of people we should also notice the genesis of the punishment of seven and fourteen years' imprisonment In Mahomedan Criminal Law the punishment of loss of one or two limbs was imposed in certain cases and this sort of punishment was awarded even by the judgments of English Judges at the end of the 18th Century when the Mahomedan Criminal Law was the law of the country. But this sort of punishment was done away with soon after the early British Indian administrators took up the actual administration of the country (3).

Punishment of
loss of limb

(1) This was written 1837 and things are different now. The operation of education and of time, referred to by Lord Macaulay has removed the evil to a great extent.

(2) Note Q annexed to the 1st Draft. Adultery in Hindu Law is both a sin and a crime and both the adulterer and the adulteress are liable to punishment. See Sir G. D. Banerjee's *Hindu Law of Marriage and Stridhan*. 3rd Ed p. 133.

(3) See Lec. VIII. How far codification has touched Hindu and Mahomedan Law, under heading Mahomedan Criminal Law. Mitigation.

Lec. III.

In Benares Brahmins were exempt from capital punishment till 1817 when that rule was abolished (1).

Condition of
People and the
Indian Contract
Act.

Now we shall notice how the condition of people has affected the provisions of the *Indian Contract Act*. Section 1 of that Act enacts, *inter alia*, that nothing contained in the *Indian Contract Act* shall affect any usage or custom of trade. The expression "any usage or custom of trade" means a particular usage as distinguished from a general or universal usage. A general usage inconsistent with the provisions of the Act, has no binding force ; because "an universal usage cannot be set up against the general law" (2). Sections 110, 190, 211 of the Indian Contract Act refer to usage or custom of trade.

Trade customs

Champerly and
Maintenance.

In the next place we shall notice what is the law of *Champerly* and *Maintenance* in this country and how English law on the subject has been modified by the judiciary to suit the condition of the people of India. The law in India on this subject is not the same as it is in England. The Statute of Champerly being part of the Statute law of England, has no effect in the Mofussil of India ; and the Courts of India do admit the validity of many transactions of that nature, which would not be recognised or treated as valid by the courts in England. At the same time the Indian courts do not sanction every description of maintenance. The true principle is that administering, as the judges in India are bound to administer, justice according to the broad principles of equity and good conscience, the Indian courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or of litigation disturbing the peace of families and carried on from a corrupt and improper motive (3). In India cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted with funds by somebody else ; and for this reason a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se*, opposed to public

(1) See Lec. VIII. Reg. XVII of 1817 §15.

(2) *Meyer v. Dresser* (1863-4) L.J.C.P. 289 ; 16 C.B.N.S. 646
Moothora v. I.G.S.N. Coy. (1883) 10C 166, 185.

(3) *Chedambara v. Renga Krishna*, (1874) 1 I.A. 241 ; 13 B.L.R. 509

policy. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party, or to be made, not with the *boni fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy—effect ought not to be given to them. The English laws of maintenance and champerty are not of force as specific laws in India. The English statutes on the subject were passed in early times, mainly to prohibit high judicial officers and officers of state from oppressing the King's subjects by maintaining suits or purchasing rights in litigation. No doubt, by common law also, it was an offence for these and other persons to act in this manner. Before the acquisition of India by the British Crown, these laws, so far as they may be understood to treat as a specific offence the mere purchase of a share of a property in suit in consideration of advances for carrying it on, without more, had become in a great degree inapplicable to the altered state of society and of property. They were laws of a special character, directed against abuses prevalent, it may be, in England in early times, and had fallen into, at least, comparative desuetude. Unless therefore they were plainly appropriate to the condition of things in the Presidency towns of India, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British law. *The condition of the Presidency towns, inhabited by various races of people*, and the legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Mahomedans and Hindus by their own laws and usages respectively, or where only one of the parties is a Mahomedan or Hindu by the laws and usages of the defendant, clearly show that these special laws are inapplicable to the Presidency towns (1).

LEC. III. '
 Champerty and Maintenance

In the next place we shall notice how Section 16 of the Indian Contract Act was originally drafted and subsequently amended to suit the condition of people.

The subject of agricultural indebtedness and of money lenders and their dealings with the poorer and more ignorant classes is still engaging the attention of the Govern-

(1) *Ram Coomar v Chunder Canto* (1876) 4 I.A. 23, 45, 46, 47. See also *Bhagwat v. Deby* (1898) 35C 420.

L.E.C. III.

Condition of
people and codi-
fication.
Sec 16 Indian
Contract Act
"Ignorant
peasantry" and
"astute money
lenders."

ment of the country. Opinions differ as to the nature of the remedies to be adopted to meet an admitted evil, but an evil the magnitude of which undoubtedly differs considerably in different parts of India. It has been urged on the Government that stern restrictions should be put on the alienation of land and the provisions of the *Dekkhan Agriculturists' Relief Act* should be applied universally. But the conditions of land-tenure and of the land-holding classes are so widely divergent in the different provinces of this great Empire that legislation which would be suitable and beneficial in one province would be unsuitable and prejudicial in another. Then again it has been urged that the law of *damduput* (according to which interest on a loan can never exceed the principal) should be extended to all classes. The Government has also been urged to re-enact the Usury Laws and to give the courts a discretion in all cases over the amount of interest to be recovered in judicial proceedings. But after careful consideration the Government rejected all those suggestions. The Government have no desire to interfere with freedom of contract where the parties to a contract are really free and contract with each other on a footing of equality. Under these circumstances the parties can make their own contracts and arrangements much better than the Government can make them for them. Before the passing of the Indian Contract Act Amendment Act (VI of 1899) law sufficiently provided for the case of fraud; a contract induced by fraud might be avoided at the instance of the party defrauded. But at the same time the Government do not wish to interfere with the discretion of the parties where they are in a position to give a free and intelligent consent to the terms of their contract. If a man makes a bad bargain he must stick to it, and learn wisdom for the future. But then there is an intermediate class of cases for which the law ought to make further provision. There may be no fraud, but the relation between the parties to a contract may be such as that one of them is practically in the power of the other, and that power may be used to extort unfair terms. In that case there is no real freedom of contract. There is consent, it is true, but it is consent obtained by unfair pressure. To some extent this intermediate case was provided for by the Indian Contract Act as it stood before 1899, (Act VI of 1899 §2) when it was amended. Section 16 of the Contract Act of 1872 provided for the avoidance of contracts in certain specified cases where undue influence had been used. But the

framers of that Act did not see fit to embody in the Act the general principle which underlies the particular cases which they specified. The original Section 26 of the Indian Contract Act was in force for more than a quarter of a century, and it was found wanting. Experience had shown that the old section had failed to meet the evils which confronted the legislators and judges. It was, therefore, found necessary to enlarge the powers of the courts, and in 1899 the Legislature amended the section and introduced into it the underlying principle by providing "where the relations between the parties to a contract are such that one of the parties is in a position to dominate the other, and he uses his dominant position to impose unfair terms on the other," the court can open up the whole transaction, and either set it aside, or if the parties cannot be restored to their original position, see that right and justice is done. Of course the court is to be satisfied that such relations do subsist between the parties as to enable one of them to dominate the will and consent of the other, but when that is shown, the court can go behind the terms of the contract and see whether the transaction is fair and reasonable or not.

In amending old §16 of the Indian Contract Act in 1899 the Legislature merely invested our courts with equitable powers which have long been possessed by English Courts. In the exercise of these powers our courts have the English decisions, not, of course, as binding on them, but as useful lights to mark out the way. The amending Act of 1899 may be regarded as restoring to our courts an old jurisdiction rather than as creating a wholly new one. Before the passing of Act VI of 1899 the British Indian Courts were bound by the somewhat too narrow provisions of the old §16 of the Indian Contract Act. But before the passing of the Indian Contract Act of 1872 they had a freer hand. The time-honoured direction to Indian Courts, embodied in many Acts, was that, in all matters not provided for by positive enactment, they were to act 'according to justice, equity and good conscience.' The practical effect of this direction was that the British Indian Courts administered English law free from peculiarities or technicalities of local origin. This liberty of the courts, under certain limitations, has been restored by the amending Act of 1899. Referring to the subject of money-lenders and money-lending contracts the then Law Member (1) remarked "We

L.E.C. III.

Indian Contract
Act Amendment
Act (VI of 1899).

Its object

(1) The Hon'ble Sir M. D. Chalmers. *The Gazette of India* 1899 Pt. VI. p. 12. (January 21, 1899).

LEC III.

recognize that as Indian agricultural society is at present constituted, the money-lender is the capitalist, and an essential factor in it. We have no desire to eliminate or unduly harass the people who make loans to the agricultural and poorer classes. It is the abuses and excesses and not the legitimate use of the system which we wish to curb." The main purpose of this Act (VI of 1899) is to protect the weak and simple from the clutches of unscrupulous money-lenders.

Transfer and acquisition of *Sir*-rights in the Central Provinces.

The Central Provinces Tenancy Act. (XI of 1898).

We shall also notice the provision of another Act which has been passed mainly for the protection of ignorant ryots.

The Central Provinces Tenancy Act (XI of 1898) has made radical changes in the law of transfer and acquisition of *Sir*-rights, in the position and *status* of occupancy and ordinary tenants and in raising the condition of sub-tenants. Before the passing of Act XI of 1898 a proprietor who alienated his rights of ownership was maintained in the enjoyment of occupancy-rights in his home farm, but only if he had not expressly agreed to the transfer of the rights of cultivation or a court had not expressly directed such transfer. It was found, as might have been expected, that so long as a debtor was allowed the option of contracting himself out of the protection which the law intended to afford him, the same pressure of circumstances which forced him to pledge or sell his land, also forced him to relinquish the protection. To remove this evil the Legislature, by adopting the law on this subject, in force in the North-Western Provinces (now the United Provinces of Agra and Oudh), refused to the owner of the option of parting with the occupancy of his *sir*-land even by express agreement. Power to relax this prohibition has, however, been given to the Chief Commissioner under certain specified circumstances (2)

Bengal Tenancy Act and condition of people.

"We have a population" said Sir C. P. Ilbert in commenting on the Bengal Tenancy Bill "of some sixty millions, mainly deriving their means of subsistence, directly or indirectly, from the soil; the great majority, directly as cultivators, a small minority, indirectly, as rent-receivers. The mutual rights of these two classes, the rent-receivers and the cultivators, are uncertain and obscure; the machinery for ascertaining and enforcing those rights is insufficient and defective; and the result is friction, which has taken different forms in different parts of the province."

(2) §45 *The Central Provinces Tenancy Act* (XI of 1898). See *Gazette of India*, Oct. 9, 1897. Pt. V. p. 136.

To remove this unsatisfactory state of affairs in Bengal the Bengal Tenancy Act was passed. REC. III.

When a new and wild territory is annexed, it becomes at once an integral part of British India and British Indian law applies to it. But a refined and elaborate system of law is wholly unsuitable to such territory and its population. To a greater or less extent the people must be left to follow their own customs and the introduction of English law must be gradual and tentative. To provide for legislation for such territories 33 and 34 vic. c 3 was passed, which authorized the Governor-General in (executive) Council to make regulations for the peace and good Government of such territories in British India. This statute was the result of a despatch from the Government of India to the Secretary of State for India, dated the 10th January, 1868, which was drafted by Sir H. S. Maine (1)

Non-Regulation
Provinces 33 & 34
Vic. C. 3 (1867).

Special and local laws and usages have been saved by the *Negotiable Instruments Act* (§1); *The Transfer of Property Act* (§108); *The Indian Succession Act* (§§331, 332); *The Easements Act* (§§2, 18, 20); *The Trusts Act* (§1).

Saving of local
law and usages

The following enactments provide that the rules of Hindu, Mahomedan and Buddhist law, in cases involving questions regarding succession, inheritance, marriage or caste, or any religious institution or usage, should be followed.—*Burma Laws Act* (XIII of 1868) §13; *The Central Provinces Laws Act* (XX of 1875) §5; *The Punjab Laws Act* (IV of 1872) §5; *The N.-W. Frontier Province Law and Justice Regulation* (Reg. VII of 1901) §27; *Madras Act* III of 1873 §16; *Bom. Reg.* IV of 1827 §26; *Act* XII of 1887 §37.

From 1772 the rules of Civil Procedure were drawn up with special reference to the condition of people—the time of the sitting of the courts, compelling attendance of witnesses were the subject of special rules in the Plan of Warren Hastings, the Civil Procedure Regulation of Impey and in subsequent Regulations. At the present time we find similar provisions in the Civil Procedure Code (V of 1908) e.g. entering Zenana and arrest of judgment-debtor (2); exemption of *pardanashin* ladies from personal appearance (3); substituted service of summons (4); examina-

Condition of
people and Civil
Procedure Code

(1) See *Life of Sir H. S. Maine* by Grant Duff p 360. See also Lecture V.

(2) §55 Act V of 1908.

(3) §132 Act V of 1908.

(4) Ord. v. r. 20, Act V of 1908 *Clark v. Mullik* (1839) 2 M I A. 268. Woodroffe's *Civil Procedure Code*. p 627.

L.E.C. III.

Difficulties of
codification in
British India.

tion of *purdanashin* ladies on commission. Indian ladies not exempted under §132 of the Code are allowed to remain in their *palkis* in court while giving evidence (1).

Existence of so many different schools of Hindu and Mahomedan Law in British India may lead some people to think that the work of codification in this country is an impossible task. But if we examine the history of codification in Germany (2) and Japan we find that the state of law before codification in those countries was as bad, if not worse, as it is now in this country.

In 1867 Japan had as many divergent laws and customs as existed in Germany before codification of German Law and as exists in British India at the present time. The written laws of some three hundred principalities were modified by local customs of even more restricted validity, and across the territorial laws and customs there ran well-defined class distinction. But in those countries codification became possible only when the people of those countries saw the practical evils arising from diversity of law and were animated by a passionate desire for national unity. The common law of those countries were more or less systematized before codification. But the main difficulty in this country is that there is little or no appreciation of the practical evils arising from diversity of law. It was the administrators of justice in this country, who felt the evil effects of diversity of law and attempted to remove them by codification. The object of codification in British India has been and still is to provide a body of law for the government of the country so expressed that it may be readily understood and administered by the English and Indian government servants without extrinsic help from English law libraries. Codification having such an origin cannot go any further. At the beginning of the Twentieth century after a century of British rule in this country, both the national and legal consciousness of the people have been roused and now this is the time, when the people are striving for national unity, to make them understand that national unity means unity of law and unity of law cannot be attained without codification. In this movement the Indian Universities, like the German and Japanese Universities should take the leading part. With the scientific study of law, as has been introduced into the curriculum of law

(1) See Woodroffe's *Civil Procedure Code*. 1st Ed. pp 1052, 1054 note (2).

(2) See p. 28 note (2) also XII, L.Q.R. 17 (1896).

study in the Universities of Calcutta and Madras, the desire for unification of law is sure to grow. With the change in the constitution of the different Legislative Assemblies in British India, allowing seats to the representatives of the different communities on the Legislative Councils, the danger of interference with the Hindu and Mahomedan religion has been greatly reduced. With the constitution of Standing Law Commissions or Committees (1) the task of systematization of Common law of India by compilation of Digests relating to the different branches of Hindu and Mahomedan law will be effected, and the noble work begun by Lord Macaulay and his colleagues in the 19th may be completed in the 20th century.

LEC. III.
Conclusion.

The subject of codification, like any other subject, has its supporters and opponents and before proceeding any further we shall deal with what the opponents of codification have to say on the matter and in the next lecture we shall deal with the objections to codification.

(1) See Lec. XI. *Infra*.

LECTURE IV

OBJECTIONS TO CODIFICATION. HOW THEY HAVE BEEN MET IN BRITISH INDIA

First objection.
Inherent
incompleteness
of Codes.

It has already been mentioned that a code is a want developed by progressive and unscientific legislation (1), and that it is impossible to have a Code which shall be complete and self-sufficing, shall absolve from the necessity of researches into the case law, shall preclude the judicial development of law in the future and shall provide a simple rule applicable to every case with which the practical man may have to deal (2). Such being the nature of codes, it is sometimes said that it is of no use to have codes, or in other words the first objection against codification is based on inherent incompleteness of codes. It is said that the individual cases which may arise in fact or practice are infinite and therefore they cannot be anticipated and provided for by a body of general rules.

But this objection is not applicable to codification only but is equally applicable to judiciary and customary law. True, an ideal code is an impossibility; true, no Code can be complete or perfect, but it may be less incomplete than other kinds of law and be free from the great defects found in them (3). The Code may be brief, compact, systematic and therefore knowable as far as it goes and many devices may be hit upon to remove this defect.

Its remedy.
(A.) Use of
Definitions.

The defects of the French Codes, resulting from the absence of definition of technical terms, have been avoided in British India by the use of definitions and illustrations in the Codes.

Macaulay.

“In our definitions” says Lord Macaulay (4) “We have repeatedly found ourselves under the necessity of sacrificing neatness and perspicuity to precision, and of using harsh expressions because we could find no other expressions which would convey our whole meaning, and no more than our whole meaning. Such definitions standing by themselves might repel and perplex the reader, and

(1) Halsbury's *Laws of England*, Vol. I. Introduction CCVIII. CCIX.

(2) *Encyclopædia of the Laws of England*, Vol. III, 2nd Ed p 127

(3) See the Introductory pp 2 —10.

(4) Report of the First Law Commission to Lord Auckland dated the 14th October 1837

would perhaps be fully comprehended only by a few students after long application. Yet such definitions are found, and must be found, in every system of law, which aims at accuracy. A legislator may, if he thinks fit, avoid such definitions, and by avoiding them he will give a smoother and more attractive appearance to his workmanship, but in that case he finches from a duty which he ought to perform, and which somebody must perform. If this necessary but most disagreeable work be not performed by the law-giver once for all, it must be constantly performed in a rude and imperfect manner by every judge in the empire, and will probably be performed by no two judges in the same way. We have therefore thought it right not to shrink from the task of framing these unpleasing but indispensable parts of a Code. And we hope that when each of these definitions is followed by a collection of cases falling under it, and of cases which, though at first sight they appear to fall under it, do not really fall under it, the definition and the reasons which led to the adoption of it will be readily understood."

Another device adopted by the Indian Law Commissioners is what is some times called "Macaulay's invention of adding authoritative illustrations to the enacting text of a Code" (1).

1B Use of Illustrations.

This method of stating the law is the greatest specific advance that has been made in modern times in the art, called by Mr. Symonds "the mechanics of law-making" (2). "It is an instrument" says Sir F. Pollock (3) "of new constructive power, enabling the legislator to combine the good points of Statute law and case law while avoiding almost all their respective drawbacks. The skilled imagination of the draftsman who devises the illustrations may anticipate many future cases, but it cannot be all-exhaustive. A good Code, however, would do this: it would easily enable one to discover whether a given case was really difficult or not."

The illustrations do greatly facilitate the understanding of the law and at the same time serve as defence of the law. They make nothing law which would not be law without them. They only exhibit the law in full action, and show what its effect will be on the events of common life. They are never intended to supply any omission in the written law, nor do they ever put a strain on the written law. They are merely instances of the practical

(1) Pollock's *Digest of the Law of Partnership* 7th Ed. Preface.

(2) *Encyclopædia Britannica*. 8th Ed. "Codification"

(3) *Digest of the Law of Partnership*. (1877 Ed.) p. IV.

I, EC. IV.

application of the written law to the affairs of mankind (1).

How illustrations
may make law.

The correctness of the decision contained in any illustration is not to be questioned in the administration of the law. The illustrations are not merely examples of the law in operation, but are the law itself, showing by examples what it is. The statement that "the illustrations make nothing law which would not be law without them" is correct if understood as merely importing that, in the view of the Legislature, the illustrations determine nothing otherwise than what without them would have been determined by a right application of the rules to which they are annexed. As, however, much law has been made by judicial decisions, which determine questions respecting the application of written rules of law, so law may, without impropriety be said to be made by the illustrations, in the numerous cases in which they determine points about which, without their guidance, there would be room for difference of opinion even among learned and able Judges. It is chiefly in this way that the illustrations, while they make the definitions and rules more easy to be understood, also serve to render them more precise. The operation of judicial decisions in making law precise is a natural process, and that process is adopted and improved in the use of illustrations (2). But it is difficult to say what precise weight ought to be attached to illustrations. So far as they merely serve to explain the meaning of the section, "they may often be found useful, especially amongst a class of judicial officers who are not very conversant with the meaning or working of the section itself" (3). But illustrations ought never to be allowed to control the plain meaning of the section itself, and certainly they ought not to do so, when the effect would be to curtail a right which the section in its ordinary sense would confer (4). To be of real service to those for whose assistance the illustrations are intended, they ought to be pellucidly clear in their phraseology (5).

In *Nanak Ram v Mehin Lal* (6) Stuart C J in discussing the question of utility of illustrations said "But

(1) Lord Macaulay's *Letter to Lord Auckland* dated the 14th October 1837.

(2) Report of Lord Romilly to H M Queen Victoria dated 23rd June 1863, published in the *Gazette of India, Extraordinary*. July 1, 1864 pp 53, 54.

(3) *Koylash v Sonatun* (1881) 7C. 132, 135 per Garth C. J.

(4) *Koylash v Sonatun*, (1881) 7C. 132, 135. *Nanak Ram v Mehin Lal*, (1877) 1A. 487, 495. *Kamalammal v Peeru*, (1897) 20M 481, 483.

(5) *Nanak Ram v Mehin Lal*, (1877) 1A. 487, 496.

(6) (1877) 1A. 487, 495.

for myself, I can truly say I have never experienced their utility, and I fear they sometimes mislead, and I observe they are more regarded in the subordinate Courts in these Provinces, and even by the pleaders of this High Court, than is the paramount language of the Act itself, of which, however, as I have remarked, they, strictly speaking, form no part. With respect to the present case, plainer language than that used in § 127 of the Contract Act it would be difficult imagine, and why it should have been thought proper to illustrate it at all, I do not very well comprehend.

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Of objection to use of illustrations.

. . . . Now this illustration (*c.*, as it stands may be either good or bad law, if it means that the party C without any privity, and in fact merely as a volunteer, agreed to pay for the goods in default of B, and no other act or fact in the way of consideration appearing, then no doubt the agreement would be void, and the illustration would be right. But it does not of itself show that. It assumes the absence of consideration, without any definition of the term other than that given in § 127 itself, and so far it is calculated to mislead. To be of real service to those for whose assistance these illustrations are intended, they ought to be pellucidly clear in their phraseology, and, if possible, I had almost said infallibly sound in their law." This is a "somewhat captious depreciation of the utility of illustrations in general" (1)

When we remember that the Indian Contract Act contains 266 sections and about 311 illustrations and that within the last 40 years only one illustration has been so severely criticized we can safely say that the use of illustrations in the Anglo-Indian Codes in the last century has vindicated itself. Yet it is a noticeable fact in the Acts of the Council of the Governor-General passed within the last few years, that the use of illustrations has been studiously avoided (2) and one of the Honourable Members has expressly approved of this course.

Although the illustrations do obviate many questions of construction and do much to fix the sense of the law, yet undoubtedly many cases occur in which there is difference of opinion among Judges as to what the law is. Room is still left for doubts as to the meaning of rules, and also as to the right application of illustrations, and cases do arise where the enacted law is silent; in all such cases the

(1) Pollock's *Indian Contract Act*, 2nd Ed p. 443 Notes on § 127 Contract Act.

(2) *The Indian Lunacy Act, 1912*; *Indian Electricity Act, (IX of 1910)*, *Indian Factories Act, (XII of 1911)*.

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2nd objection.

Judges are compelled to construe the law in their own way (1) But the power of construing the law in cases in which there is any real reason to doubt what the law is amounts to the power of making the law (2). It consequently inevitably follows that if no measures are taken to prevent it, the enacted law is ere long encumbered with a mass of comments and decisions. Hence arises the second objection to codification viz , it is no use having codes as they will, in course of time be overlaid with an accumulating mass of comments and decisions This is, no doubt an evil which no mode of framing the law itself can completely exclude, but to mitigate the evil, steps should be taken to have codes revised and amended at intervals of only a few years

“The publication of this collection of cases” says Lord Macaulay (3) “decided by the legislative authority will, we hope, greatly limit the power which the Courts of Justice possess of putting their own sense on the laws But we are sensible that neither this collection nor any other can be sufficiently extensive to settle every question which may be raised as to the construction of the Code Such questions will certainly arise, and, unless proper precautions be taken, the decisions on such questions will accumulate till they form a body of law of far greater bulk than that which has been adopted by the Legislature. . . . it is most

Its remedy.
Revision.Macaulay and
Romilly.

desirable that measures should be taken to prevent the written law from being overlaid by an immense weight of comments and decisions. We conceive that it is proper for us, at the time at which we lay before Your Lordship in Council the first part of the Indian Code, to offer such suggestions as have occurred to us on this important subject In civil suits which are actually pending we think it on the whole desirable to leave to the Courts the office of deciding doubtful questions of law which have actually arisen in the course of litigation. But every case in which the construction put by a Judge on any part of the Code is set aside by any of those tribunals from which at present there is no appeal in India, and every case in which there is a difference of opinion in a court composed of several Judges as to the construction of any part of the Code, ought

(1) Lord Romilly's *Report* dated 23rd June 1863, in the *Gazette of India, Extraordinary*, July 1, 1864, p. 56.

(2) Lord Macaulay's *Letter to Lord Auckland*, dated, 14th October 1837.

(3) *Ibid* See also Lord Romilly's *Report* dated the 23rd June 1863. *Gazette of India, Extraordinary*. July 1, 1864.

to be forthwith reported to the Legislature. Every Judge of every rank whose duty it is to administer the law as contained in the Code should be enjoined to report to his official superior every doubt which he may entertain as to any question of construction which may have arisen in his Court. Of these doubts all which are not obviously unreasonable ought to be periodically reported by the highest judicial authorities to the Legislature. All the questions thus reported to the Government might with advantage be referred for examination to the Law Commission, if that Commission should be a permanent body. In some cases it will be found that the law is already sufficiently clear, and that any misconstructions which may have taken place is to be attributed to weakness, carelessness, wrong-headedness, or corruption on the part of an individual, and is not likely to occur again. In such cases it will be unnecessary to make any change in the Code. Sometimes it will be found that a case has arisen respecting which the Code is silent. In such a case it will be proper to supply the omission. Sometimes it may be found that the Code is inconsistent with itself. If so, the inconsistency ought to be removed. Sometimes it will be found that the words of the law are not sufficiently precise. In such a case it will be proper to substitute others. Sometimes it will be found that the language of the law, though it is as precise as the subject admits, is not so clear that a person of ordinary intelligence can see its whole meaning. In these cases it will generally be expedient to add illustrations such as may distinctly show in what sense the Legislature intends the law to be understood, and may render it impossible that the same question, or any similar question, should ever again occasion difference of opinion. In this manner every successive edition of the Code will solve all the important questions as to the construction of the Code which have arisen since the appearance of the edition immediately preceding. Important questions, particularly questions about which courts of the highest rank have pronounced opposite decisions, ought to be settled without delay; and no point of law ought to continue to be a doubtful point more than three or four years after it has been mooted in a Court of Justice. An addition of a very few pages to the Code will stand in the place of several volumes of reports, and will be of far more value than such reports, inasmuch as the additions to the Code will proceed from the Legislature, and will be of unquestionable authority, whereas the Reports would only give the opinions of the Judge which other Judges might venture to set aside."

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REVISION.

LEC. IV.

Sir James
Stephen

Re-enactments of the various codifying Acts are "as necessary as repairs are necessary to a railway. I do not think that any Act of importance ought to last more than ten or twelve years. At the end of that time, it should be carefully examined from end to end, and whilst as much as possible of its general frame-work and arrangement are retained, it should be improved and corrected at every point at which experience has shown that it required improvement and correction. If you want your laws to be really good and simple, you must go on re-enacting them as often as such a number of cases are decided upon them as would make it worth the while of a law book-seller to bring out a new edition of them" (1).

For the prevention of this great evil the enacted law ought, at intervals of only a few years, to be revised and so amended as to make it contain as completely as possible, in the form of definitions, of rules, or of illustrations, everything which may from time to time be deemed fit to be made a part of it, leaving nothing to rest as law on the authority of previous judicial decisions. Each successive edition after such a revision should be enacted as law, and would contain, sanctioned by the Legislature, all judge-made law of the preceding interval deemed worthy of being retained. On these occasions, too, the opportunity should be taken to amend the body of law under revision in every practicable way, and especially to provide such new rules of law as might be required by the rise of new interests and new circumstances in the progress of society (2).

3rd objection.
Stereotyping law

Lord Cockburn.

Such amendments and re-enactments do generally remove another objection to codification viz. that codification checks the natural growth of the law and hinders its free development or in other words stereotypes the law and takes away its elasticity which is a characteristic feature of judge-made law. "Whatever disadvantages" says Cockburn C.J (3) "attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law

(1) *Per* Sir James Stephen. See *Gazette of India, Supplement*. May 4 1872, p 534.

(2) Lord Romilly's *Report* dated 23rd June 1863 See *Gazette of India, Extraordinary*. July 1, 1864, p. 56.

(3) *Wason v. Walter*, (1868) L. R. 4 Q. B. 73, 93

is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied." LEC. IV.

In meeting this objection Sir James Stephen says (1) "Those who consider that codification will deprive the common law of its "elasticity" appear to think that it will hamper the Judges in the exercise of a discretion, which they are at present supposed to possess, in the decision of new cases as they arise.

Reply of Sir
James Stephen.

"There is some apparent force in this objection, but its importance has been altogether misunderstood. In order to appreciate the objection, it is necessary to consider the nature of the discretion which is vested in the judges.

"It seems to be assumed that, when a judge is called on to deal with a new combination of circumstances, he is at liberty to decide according to his own views of justice and expediency ; whereas, on the contrary, he is bound to decide in accordance with principles already established, which he can neither disregard nor alter, whether they are not to be found in any previous judicial decisions or in books of recognised authority (2). The consequences of this are, *first*, that the elasticity of the common law is much smaller than it is often supposed to be ; and *secondly*, that so far as a Code represents the effect of decided cases and established principles, it takes from the judges nothing which they possess at present. In fact the elasticity so often spoken of as a valuable quality would, if it existed, be only another name for uncertainty

The truth is that the expression "elasticity" is altogether misused when it is applied to English law" (3) Then again we should also remember that a Code binds the Courts so far as it goes. It does not affect powers previously possessed unless it expressly takes them away. Still less does it affect the power and duty of the Court to act according to equity and good conscience in cases for which no express provision is made. The Court has therefore in many cases where the circumstances required it, acted upon the assumption of an inherent power to do that

(1) *History of the Criminal Law of England* Vol. III. p. 352, Ch. XXXIV.

(2) See also Remarks of Lord Esher in *Munster v. Lamb*, (1883) 11 Q.B.D. at p. 599, and those of Parke J in *Mirehouse v. Rennell*, (1833) 1 Cl and F 527, 546 SC 36 R.R. 180, Dicey's *Law and Opinion in England*, p. 364.

(3) Stephen's *History of the Criminal Law of England*, Vol III, Ch. XXXIV. pp. 352, 353

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Dicey

justice for the administration of which alone it exists (1).

Prof Dicey answers this objection thus "if a statute is apt to reproduce the opinion not so much of to-day as of yesterday, judge-made law occasionally represents the opinions of the day before yesterday" (2) "Judicial legislation" says Prof Dicey (3) "is a form of law-making which aims at and tends towards the maintenance of a fixed legal system" Thus we see that while judicial legislation "tends" towards the maintenance of a fixed legal system, codification produces certainty where there was uncertainty This objection may apply to bad but not to good codification "No country" says Sir C. P. Ilbert (4) "has studied law, both historically and systematically, with more fruitful results than Germany. In no country has codification been more successful Nor is there reason to apprehend that the German Codes will arrest the progress of German law, whether in the form of judicial development or of legislative amendment. On the contrary, the scientific formulation of existing rules, provided the mistake is not made of attempting to stereotype details, illustrates and brings into prominence their defects and thus stimulates their judicial development, and suggests and facilitates legislative amendment The chief reason why so many of the statutory amendments of the English common law have been unsatisfactory in form and in effect is that they necessarily take the form of exceptions from indefinite or imperfectly formulated rules If the rules were formulated, their statutory modifications would fit more easily and naturally into the general system, instead of being awkward excrescences, which tend to embarrass the courts in their application and development of general principles, and are consequently regarded with jealousy and suspicion by the judges"

In British India the Anglo-Indian Codes, by formulation (though not always scientific) of rules of law, have their defects made prominent and thus the judicial development of these rules is stimulated and their legislative amendments facilitated.

The Anglo-Indian codes are not exhaustive and when the court has jurisdiction to make an order it has (although

(1) *Panchanan v Dwarka*, (1905) 3 C.L.J. 29, 31; see also §151 of the Civil Procedure Code (V. of 1908) *Kripa v Annada*, (1907) 6 C.L.J. 273 *per Mookerjee J. The Irrawaddy Flotilla Co. v. Bugwandas*, (1891) 18C. 620, 628 (Contract Act).

(2) *Law and Opinion in England*, 367.

(3) *Law and Opinion in England*, 365.

(4) *Legislative Methods and Forms*, 159.

there may be no section of the code applicable) inherent LEC. IV. power to have that order carried into effect (1).

Section 151 of the Civil Procedure Code (V of 1908) provides "nothing in this code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court." Besides this general rule, the principles of restitution, of power to amend, of power to enlarge time, have been recognized in the Civil Procedure Code (2).

In British India the courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law (3). This is of course subject to the qualification that, in the exercise of its inherent power, the court must be careful to see that its decision is based on sound general principles, and is not in conflict with them or the intentions of the Legislature (4).

Thus we see that the Anglo-Indian Codes while avoiding the evils of judicial legislation do not stereotype law. They are amended and re-enacted at convenient intervals in the light of decided cases. They not only allow the British Indian Courts to exercise their inherent power, but authorize them to make such orders as may be necessary for the ends of justice.

It is sometimes argued that codification being the work of many persons, the provisions of codes are sure to be defective and incoherent. This objection, as has been stated in the Introductory Lecture is not applicable to codes in general. Value of this objection may easily be tested by examining the provisions of the Anglo-Indian Codes. We shall deal with this objection more fully in Lectures VI and VII. With a few exceptions the Anglo-Indian Codes are not open to this objection. Codification in British India from the year 1834 to 1882 was generally the product of the labour of different Law Commissions and Law Members of the Council of the Governor-General of India. But the leading

Fourth objection.

(1) *Jogendra v Wazim-un-nissa*, (1907) 31C. 860, 11 C.W.N. 855 (Civil Procedure Code). See also *Kripa v Annada*, (1907) 6C.L.J. 373 per Mookerjee J. (Tenancy Act); *The Irrawaddy Flotilla Coy. v Bugwandas*, (1891) 18C. 620, 628 (P.C.) (Contract Act).

(2) Act V. of 1908 §§144, 148, 152 and 153.

(3) *Narsingh v Mongal*, (1882) 5A. 163, per Mahmood J.

(4) *Chhayemannessa v Basirat*, (1910) 37C. 399, 404, per Mookerjee J.

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and guiding principles of the Anglo-Indian Codes had been the conceptions of one luminous intellect either at the head of the Law Commission or the Legislative department of the Government of India. Macaulay, Romilly, Maine, Stephen and Stokes are responsible for the leading and guiding rules of many of the Anglo-Indian Codes. But their draft Bills had been altered and amended, when necessary, after having the opinion of practising lawyers, merchants and administrators.

Bengal Tenancy Act.

This objection is of course applicable to certain codes e.g. the Bengal Tenancy Act, an Act originally drafted by the Legislative Department of the Government of India under the guidance and supervision of that eminent jurist Sir C. P. Ilbert, who was the Law Member at the time. As originally framed it was incomplete in some respect and had also a few inconsistencies. Its incompleteness was merely an *accident*, because of Sir C. P. Ilbert's unfamiliarity with the condition of people of Bengal; but it was not disfigured by too many inconsistencies. After the passing of the Act its incompleteness and inconsistencies were soon discovered and for sometime the Act was amended by the Legislative Council of the Government of India. Then the right of amending the Act was delegated to the Local Government with the result that the present Tenancy Act is full of inconsistencies and is a fruitful source of litigation. It is time that the Act should be thoroughly examined and carefully redrafted and a new repealing Act passed. Thus we find that the defect complained of is not to be found in codes in general, but only in those which had been tampered with by men of different mental calibre.

5th Objection.

The next objection is that a code makes the defects of the law more obvious, and therefore emboldens knaves. The answer is that knaves who know or take good advice upon the pitfalls of the law, have probably open to them greater opportunity to deceive others, in the uncodified than in a codified state of the law. One of the objections against the passing of the Indian Easements Act was that it would, by informing people of their rights, provoke litigation, and abolish or otherwise interfere with, easements recognised only by local usage. In reply to this objection it was urged that it was a matter of ordinary experience that people were more prone to bring or resist claims to doubtful than to certain rights, and that by its explicit declarations of the law on points then held doubtful by the people, the Bar and the Judges of the Subordinate Courts, the Act would check

Easements Act.

rather than increase litigation (1). Smooth and satisfactory working of the Act for the last thirty years shows that this objection is groundless altogether. LEC IV.

The next objection is based on the alleged failure of the existing codes. The answer to this objection is that the failure of a particular code, even admitting its failure to be as complete as affirmed, proves nothing against codification in the abstract ; a particular code might have failed, not because it is a code, or by virtue of its qualities as a code, but by reason of its faulty construction. "All the continental nations" says Chalmers (2) "have codified their laws, and none of them show any sign of repenting it. On the contrary, most of them are now engaged in remodelling and amplifying their existing code. In India a good deal of codification has been carried out, and public and professional opinion seems almost unanimous in its favour." Sixth objection.

In spite of the forebodings of some people, the Anglo-Indian Codes have been in the words of Sir James Stephen "triumphantly successful" (3) True, none can claim for the Anglo-Indian Codes perfection of any sort, and omissions and defective drafting have been found in many of them, but we should remember that no legislation can be perfect, and experience has shewn that the Anglo-Indian codes have been a great boon to the courts, that they have reduced the provisions of the law on the subjects with which they deal, into a comparatively narrow compass and that they are for the most part free from ambiguity and are easily intelligible by the ordinary lay mind. Such being the nature and usefulness of the Anglo-Indian Codes we shall now attempt to trace the origin and principles of codification in this country in our next lecture.

(1) *The Gazette of India*, 1880. Pt. V., p 480

(2) *Bills of Exchange*, 7th Ed., p 111.

(3) Stokes' *Anglo-Indian Codes*, Vol I 71.

LECTURE V

GENESIS, PRINCIPLES, FORM AND INTERPRETATION OF THE ANGLO-INDIAN CODES

Genesis of
Anglo-Indian
Codes.

When the Civil Government of Bengal, Behar and Orissa became vested in the East India Company, the Hindus and Mahomedans were in possession of their respective written laws, under which they had acquired property by descent, purchase, gift and other modes of acquisition. The Mahomedan Government had established its own criminal law to the exclusion of that of the Hindus, but it left the Hindu law of property, marriage and succession untouched. The early British administrators were loath to disturb the laws of the country. They found it impossible to introduce the rules of English law as the general standard of judicial decision in Bengal without violating the fundamental principle of all civil laws, that they ought to be "sutable to the genius of the people, and to all the circumstances in which they may be placed" (1). Till 1772 no regular scheme for conducting the business of revenue and administration of justice was framed. Every *Zamindare* and every *taluk* was left to its own particular customs. "But these were not inviolably adhered to, the novelty of the business to those who were appointed to superintend it, the accidental exigencies of each district, and not unfrequently *the just discernment of the Collector* (2), occasioned many changes" (3). Before 1772 it was not thought advisable either by the Local Government or by the Court of Directors (and perhaps it was not practicable in the actual state of the Company's service) to vest the immediate management of the revenue or the administration of justice in the European Officers of the Company (4). In 1772 Warren Hastings took the first step towards improving the administration of justice (5). In that year the Committee

(1) Vattel. Bk. I. Ch. III.

(2) Here we get a glimpse of the application of the maxim of "Justice, equity and good conscience."

(3) See the *Remarks of the President and Council to the Court of Directors*. Dated, 3rd November, 1772.

(4) Harington's *Analysis* Vol. I. 7-8. Cowell's *Courts and Legislative Authorities in India*, 24-28. 5th Ed.

(5) See *Extracts from a letter from the Committee of Circuit to the Council at Fort William*, dated at Cossimbazar, 15th August, 1772 in Colebrooke's *Supplement*, pp. 8-23. Harington's *Analysis*, Vol. I. p. 8. Field's *Regulations* Ch. IV. p. 136. Cowell's *Courts and Legislative Authorities in India*. p. 28. 5th Ed.

of Circuit proposed a Plan for the administration of justice, Lec. V. which was adopted by the Government on the 21st of August 1772. This Plan is generally known as the Plan of Warren Hastings and has been referred to as "General Regulation for the Administration of Justice, proposed by the Committee of Circuit at Cassimbazar on the 15th August, 1772 and made and ordained by the President and Council in Bengal" in Colebrooke's Supplement. The chief object of this Plan was to improve the administration of justice by establishing and reconstructing the Civil and Criminal Courts in this country (1). The Directors of the East India Company were not willing, at that time, to be the suzerain power in Bengal and they remained satisfied with the *Dewan*. But Warren Hastings and some of the members of his Council, the men on the spot, found that the result of the dual system of Government was very unsatisfactory. "I conceive it" wrote Warren Hastings (2) "to be strictly conformable to justice and reason to interpose the authority or influence of the Company, who as Dewan have an interest in the welfare of the country and as the governing power have equally a right and obligation to maintain it." If we trace the origin of the Plan of 1772 we shall find that such ambition to be the suzerain power in Bengal and solicitude for the welfare of the people of this country induced Warren Hastings and his councillors to introduce many changes in the administration of justice in this country and to lay the foundation of future Anglo-Indian Codes. "In forming the enclosed plan (for the administration of justice)" wrote the Committee of Circuit (3) "we have confined ourselves, with a scrupulous exactness, to the constitutional forms of judicature, already established in this province, which are not only such as we think in themselves best calculated for expediting the course of justice, but such as are best adapted to the understanding of the people: where we shall appear to have deviated in any respect, from the known forms, our intention has been to recur to the original principles, and to give them that efficacy, of which they were deprived by venal and arbitrary innovations, by partial immunities granted as a relief against the general

Dual system
of government.

(1) *Extracts from a letter from the Committee of Circuit to the Council at Fort William, dated 15th August, 1772.*

(2) *A letter from Warren Hastings, dated 10th July, 1773 recorded in the Proceedings of Council, 3rd August, 1773. Colebrooke's Supplement, p. 166.*

(3) *Letter from the Committee of Circuit to the Council at Fort William, dated at Cosimbazar, 15th August, 1772. See Lec. I. under heading Plan of Warren Hastings, 1772.*

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and allowed abuse of authority, or by some radical defect in the constitution of the courts in being ; and these changes we have adopted with the less hesitation, as they are all of such a nature, as we are morally certain will prove both of general satisfaction, and general ease, to the people.

Letter from the
Committee of
Circuit.

“The general principle of all despotic governments, that every degree of power shall be simple and undivided, seems necessarily to have introduced itself into the courts of justice , this will appear from a review of the different offices of justice, instituted in these provinces ; which we deem necessary on this occasion, in proof of the above assertions, and in justification of the regulations, which we have recommended ” Then after giving a short review of the different courts of justice the letter runs as follows :—“From this variety of materials we have endeavoured to form the plan of a more complete, but more extensive system of judicature, by constituting two superior courts at the capital, the one for the decision of civil causes, the other corresponding to the *Phaujdarree* for the trial of criminal cases To prevent the abuse of the power vested in these courts, and to give authority to their decrees, each, instead of a single judge, is made to consist of several members ; and their enquiries are to be conducted under the inspection and sanction of the supreme administration. To render the distribution of justice equal in every part of the province, similar but inferior courts are also proposed for each separate district, and accountable to the superior. The usurped power of the officers of the collections, and of the creditors, over the persons of their debtors, is abolished.

The detestable and authorized exactions of the *Phoujdarree* Court. . . . have been prohibited ; conformably to the wise and humane injunctions of our Honourable masters, who, from the same spirit of equity, have renounced the right, hitherto exercised by the country government, and authorized by the Mahomedan law, to a commission on the amount of all debts, and on the value of all property, recovered by the decrees of its courts ; a practice repugnant to every principle of justice, as it makes the Magistrate a party in the cause on which he decides, and becomes a legal violation of the rights of private property, committed by that power, which should protect and secure it It has also been our aim to render the access to justice as easy as possible. Our motives, for the abolition of the fees of the *Cazee* and *Muftees*, will best appear from the minutes of our proceedings at *Kishen-nagur*, relating to *Haldarec*, or

tax on marriages which we forbade to be levied any longer, *L.E.C. V.* and deducted from the settlement of Nuddea, convinced of the pernicious effects of so impolitic a tax, we propose to grant the same exemption to the other districts subject to our direction.

“The same reasons, which have induced us to abolish the *Haldarree* operate with equal force against the fees of the *Cazees* and *Muftees*, which have always proved a heavy grievance to the poor, and an impediment to marriage. We have therefore determined on a total abolition of these, and of the other less dues, hitherto allowed to these officers; and to put them on the footing of monthly servants, with fixed salaries.”

Rule 23 of this Plan provided “that in all suits regarding inheritance, marriage, caste, and other religious usages, or institutions, the laws of the Koran with respect to Mahometans and those of the *Shaster* with respect to Gentoos shall be invariably adhered to.” Thus the personal laws of Hindus and Mahomedans were left untouched. To help the English judges in the discharge of their duty and to make them familiar with the rules of Hindu and Mahomedan law, Warren Hastings had a Code of Gentoos laws compiled and translated into English by Nathaniel Brassey Halhed. It was compiled in Calcutta in 1775 and published in London in 1781 (1). Warren Hastings also got *Hedaya* translated by Hamilton, first volume of this work appeared in London in 1791. Thus we find that the administrative exigencies led to the enactment of the first British Indian Regulation, which may also be termed the first British Indian Code and to the translation of portions of Hindu and Mahomedan laws.

Halhed's Gentoos Code.

Hamilton's Hedaya.

Between 1772 and 1793 many rules and orders were passed for the administration of justice, collection of revenue and other objects of a public nature. The most important of these is Impey's Regulation of 5th July, 1781, which is really the first Civil Procedure Code in British India (2).

Impey's Civil Procedure Code. Judicial Regulation of 5th July, 1781.

But prior to the year 1793, the territorial possessions of the East India Company were without any general Code of laws and regulations and in that year the celebrated Regulation XLI of 1793 inaugurated the system of Regulation Laws. In the preamble of this important regulation we find the genesis of the Anglo-Indian Codes viz. the desire of the government of the day to “enable individuals to render

(1) For full details of this code see Appendix A.

(2) For its contents &c. see Lecture I. under heading Impey's *Civil Procedure Code*.

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Reg. NLI of 1793.

themselves acquainted with the laws upon which the security of the many inestimable privileges and immunities granted to them by the British Government depends, and the mode of obtaining speedy redress against every infringement of them" and to enable the courts of justice "to apply the Regulations according to their true intent and import," or in other words to make the law cognoscible to the people of the country and to the administrators of law and justice. But this desire to make the laws of the country cognoscible, being the desire of the administrators and not of the people of the country, contributed very little to codification in this country ; and it is stated on high authority "The legitimate object of codification in India is that of providing a body of law for the Government of the country so expressed that it may be readily understood and administered both by English and Native Government servants without extrinsic help from English law libraries" (1) Administrative exigencies being the root cause of codification in India, we find that the guiding principles of codification are to a great extent different from those in France and Germany Now, what are the principles of codification in this country ? Codification being only a part and parcel of legislation, the principles of codification (in its comprehensive sense) are, to a great extent, the same as those of legislation. The guiding principle of the early Anglo-Indian legislators, was as it is now, to change the indigenous laws as little as possible. This guiding principle is based mainly on the fundamental principle of all civil laws that such laws ought to be "suitable to the genius of the people, and to all the circumstances in which they may be placed " I say *mainly*, because there is another reason why Warren Hastings took the line of least resistance viz. to win the affection and good will of the people of the country (2).

Principles of
Anglo-Indian
Codes.

Macaulay.

Now whatever might be the real reason of the Directors of the East India Company adopting the line of least resistance in legislating for the people of this country, this policy of non-interference has been and still is the cardinal principle of Anglo-Indian legislation In formulating the principle to be followed in codifying the laws of British India Lord Macaulay said "We must know that respect must be paid to feelings generated by differences of religion, of nation and caste. Much, I am persuaded, may be done to assi-

(1) See Harington's *Analysis* Introduction p. 1. *Supplement to the Gazette of India*, 1872, May 4, p. 533. Illert's *Government of India*, p. 339. *Legislative Methods and Forms*, p. 149.

(2) Halhed's *Gentoo Code*. The translator's Preface p. ix.

milate the different systems of law without wounding those feelings We propose no rash innovation, we wish to give no shock to the prejudices of any part of our subjects" (1) "We have arrived at the conclusion" says Lord Romilly "that what India wants is a body of substantive law, in preparing which the law of England should be used as a basis, but which, once enacted, should itself be the law of India on the subject it embraced . . . And such a body of law, prepared as it ought to be with a constant regard to the condition and institutions of India, and the character, religions and usages of the people, would, we are convinced, be of great benefit to that country . . . But it is our opinion that no portion either of the Mahomedan or of the Hindu law ought to be enacted as such in any form by a British Legislature" "It has been an article of faith with the British Government" says Sir Reginald Craddock (2) "to hold aloof from any interference with religion or from social customs which are closely inter-mixed with religion, and the Government in this matter occupy a position of trust to the many millions who profess these various creeds"

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Lord Romilly.

But though the Anglo-Indian legislators did their best to avoid interference with the rules of Hindu and Mahomedan law they could not avoid it, and that for several reasons viz (a) with the advent of the East India Company English law was introduced into the Presidency towns by the Charters which established courts of justice in those towns in the 18th century When it was seen that this rule meant good deal of hardship on the people of the country, this rule, so far as the people of the country were concerned, was done away with. (b) Because portions of Hindu and Mahomedan law were such as could not be administered by European Judges, as being repugnant to their sense of justice. (c) That the Hindu and Mahomedan laws relating to civil rights were on many points vague and defective, and the British Indian Judges had to supply the defect.

For these reasons the Anglo-Indian legislators and judges had to modify both the civil and criminal law applicable to the Indians by legislation and by judicial application of English legal principles introduced under the general direction to observe the doctrine of "justice, equity and good conscience". While modifying the law of the country

(1) Hansard's *Debates*. Third Series Vol. XIX 533 (1833).

(2) *Gazette of India*, 9th March, 1912 P. VI p 82 *Special Marriage Bill*

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in this way the Anglo-Indian legislators and Judges were anxious not to introduce those principles of English law which were not suited to the condition of the people of the country, and so we find that from the very beginning the Anglo-Indian administrators tried their best to avoid the introduction of rules of the English law without due consideration of the condition of the people. But in spite of all the efforts of the legislators and Judges, it was found to be an impossible task to check the introduction of the rules of English law and in 1876 Lord Salisbury, the then Secretary of State for India wrote, "The only way of checking the process of borrowing English rules from the recognized English authorities, is by substituting for those rules a system of codified law, adjusted to the best Native customs and to the ascertained interest of the country" (1)

Macaulay's
Principle.

Another important principle is "uniformity where you can have it—diversity where you must have it—but in all cases certainty" (2). It has been noticed before that the fact of co-existence of the different schools of Hindu and Mahomedan law, the Statutes of British Parliament, and the Regulations of the different legislative authorities in British India led to uncertainty of law, which soon became a serious defect in the Indian administration. The Charter Act of 1833 removed this defect to a great extent. Lord Macaulay, speaking in the House of Commons when the Bill was before the House, said "Our principle is simply this—uniformity when you can have it—diversity where you must have it—but in all cases certainty."

Ethical principles
as the basis of
codification.

Mr. Floyd Clarke, in his book "The Science of Law and Law making" advocates codification wherever it is unnecessary to base codification on any ethical principles. In the case of other branches of law which depends upon broad ethical principles Mr. Clarke thinks it should be left to case law to develop those principles.

But it is difficult to conceive any principle of law not more or less based on some ethical basis. The ancient Hindu and Mahomedan Codes are not only based on religious principles but contain rules in which Law and Religion have been mixed up. The difficulty of the Anglo-Indian Legislators is that they do not like to deal with such rules of law, lest they offend the religious susceptibilities of the people. The legislators and judges, sometimes act accord-

(1) *Despatch from the Secretary of State for India to the Government of India*. Dated 20th January, 1876.

(2) *Hansard's Debates Third Series*, Vol XIX. 533. See also *Hansard's Debates*, Third Series, Vol. XVIII. 698

ing to "justice, equity and good conscience" and in so doing they unwittingly and imperceptibly make some ethical principle or other the basis of legal rules. When these rules will be codified the ethical principles acted upon by the legislators and judges will become the basis of that code. LEC V.

The draftsmen of the Anglo-Indian Codes have all worked on the same plan. Regulation XLI of 1793 (A Regulation for forming into a regular Code all Regulations that may be enacted for the internal Government of the British Territories in Bengal) provided—that the Regulations passed annually should be numbered. The first regulation enacted in each year should be numbered one, and all subsequent regulations according to the order in which they might be passed. The number of each regulation, and the year in which it was enacted, were to be inserted at the top of every page (§3)—that every regulation should have a title; (§4)—that "there shall be a preamble to every regulation, stating the reasons for the enactment of it" (§5). If any regulation repealed or modified a former regulation, the reasons for such repeal or modification should be mentioned in the preamble; (§5)—that every regulation was to be divided into sections. Each section should be numbered according to the order in which it occurred, and the sections, where necessary should be subdivided into clauses (§6). This section also provided that the preamble was to be considered as the first section, but in the Acts of the British Indian legislature the preamble is not numbered and the numbering of sections begins with the paragraph relating to the short title of the Act)—that the subject of every section and clause should be inserted opposite to the section, in the margin, as concisely as possible (§8)—that at the expiration of each year, a copious index to the regulations passed during the year should be prepared and bound up with them (§10)—that in the English drafts of Regulations, the same designations and terms were to be applied to the same descriptions of persons and things, in order that rights, property, tenures, privileges, deeds, courts, process, officers, and generally all persons and things may be uniformly described by the same designations throughout the judicial code (§14).

Form of Anglo-Indian Codes.

Prior to 1793 there was no fixed rule about the form of the Regulations—some of them had preambles (1) and some

(1) *Judicial Regulation*, dated, 5th July, 1781 (Impey's Civil Procedure Code. See Colebrooke's *Supplement*, p. 37),—*Regulation for weavers* dated, 22nd April, 1782, and 19th July, 1786 (Colebrooke's

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were without them (1). The Regulation passed on the 21st August, 1772 (Plan of Warren Hastings) has no preamble, but section 35 of that Regulation, dealing with *dacoity* has three different parts viz 1st preamble, 2nd definition clause and 3rd punishment clause.

No illustrations.

It was not till 1793, that attempts were made to draft the Regulations according to any fixed rules of drafting. The Regulation Codes are defective in another respect viz. they do not contain any illustrations or definitions which are an important factor of the Anglo-Indian Codes. We may also notice here that the Regulations have marginal notes against the sections. But the practice of attaching such notes was dropped from the year 1834 till 1854 when the practice was again introduced, and the practice has since been to put such notes in all Bills introduced. These notes remain in the Bills during their passage through Council and into law. True, these Regulation Codes are not codes in the strict sense of the word, but their importance lies in the fact that they show how and what attempts were made, from the very beginning of British rule in this country, to make the law cognoscible and certain. By establishing regular courts of justice, these codes removed a fruitful source of uncertainty of law viz. the right of powerful zamindars to administer justice within the bounds of their zamindariaries. One of the main objects of Impey's Regulation was "that the inhabitants of these countries may not only know to what courts and on what occasions they may apply for justice, but, seeing the rules, ordinances and regulations, to which the judges are by oath bound invariably to adhere, they may have confidence in the said courts." How fully this object of the framers of the Regulations was attained is clear from the common saying in Bengal "This is not the territory of the *Mugs*, but it is the territory of the Company." This saying clearly shows how highly the people estimated the value of the Government of the Company. "Neither Plassey nor Buxar" says the Rev. Mr. Firminger (2) "was fought to win

Importance of Regulation codes.

Supplement p 457) Regulations passed on the 27th June, 1787; 11th February, 1791, 7th December, 1792 (Colebrooke's *Supplement* pp 93, 508, 167)

(1) *Judicial Regulations* passed on the 21st August 1772 (Plan of Warren Hastings See Colebrooke's *Supplement* p 1)—14th May 1772 (Colebrooke's *Supplement* p 190)—29th August, 1772 (p. 194);—6th April, 1781 (p. 27)—26th August, 1783 (p. 485)—*Reg for weavers* 23rd July, 1787 (p. 462)—23rd April, 1788; 8th August, 1788 (pp. 487, 490)—19th August, 1789 (p. 110)—10th June, 1791 (p. 166)—14th January, 1791 (p. 497).

(2) "The Old District Records of Bengal" a paper read before the Indian section of the Royal Society of Arts on January 18, 1912.

territorial sovereignty for the East India Company or the British Crown. The growth of a rural administration is the secret of the expansion of English influence in Bengal." The servants of the Company endeavoured to win the confidence of the people by impartial administration of justice (civil, criminal) and revenue, and they did win to a large extent, the confidence of the people and the object of the framers of the early Regulations was attained.

The Acts passed between 1834 and 1839 are without title (1) and some of them are without any preamble.

Titles & preambles

Now a days the Anglo-Indian Codes are drafted on the following plan viz. that each Act should be preceded by a table of contents made up of the marginal notes to the sections—that it should have a short title, indicating in a general way, the subject of the law—a preamble expressing the purpose of the Act—a statement of its local and where necessary its personal application—it should also contain a clause mentioning the time at which it is to come into force. It should be divided into sections, and where necessary, chapters and parts and lengthy sections should be subdivided into clauses and paragraphs. The definitions are put at the beginning of the Act but the illustrations go with the particular sections which they explain (2).

The following are the guiding rules on the subject of wording of the Anglo-Indian Codes—That each sentence should have only one enacting verb: that the same word should be used to express the same thing: that nouns should be used in preference to pronouns: that technical expressions should not be used unnecessarily: that "shall" should be used only when the law is directory and that "may" should be used only when the law is permissive (3)

Wording

The wording of a code should not be changed merely because it might be capable of improvement. Remarking on this subject the Special Committee appointed to consider the amendment of the Civil Procedure Code of 1882 said "We have advisedly adhered as closely as possible to the existing language, the meaning of which is now well understood by courts and by practitioners. Speaking generally, it may be said we have only departed from the phraseology of the code where experience has suggested improvements or competent authority has called for some change. We have refrained from altering the wording merely because it

(1) See *Theobald's Acts* Vol I. contents

(2) For the use of illustrations and definitions see Lec. IV

(3) Whitley Stokes' *The Anglo-Indian Codes*, Vol I XXII, XXIII.

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might be capable of improvement: for in any change, even of a verbal character, there is a risk of opening a door to fresh litigation" (1).

Arrangement of
the subject-matter
of codes.

The principles of arranging the subject-matter of codes are --(a) That all matters of the same kind should be thrown together: (b) that the simpler proposition should precede the more complex: (c) that procedure should be dealt with according to the chronological order in which ordinary events occur (d) that special proceedings and supplementary provisions should be separately treated: (e) that forms and other matters of detail should be placed in Schedules. Acting on the last principle the Special Committee appointed to consider the amendment of the Civil Procedure Code, 1882, recommended that the provisions of that Code dealing with matters of detail should be relegated to Schedules which can be amended or added to by High Courts subject to the advice of the Rule Committees. In making the recommendation the Special Committee remarked "The matters in which it (Code of 1882) has proved defective are for the most part matters of detail, and they arise mainly from the fact that it is impossible to frame a fixed and rigid code in such a manner as to sufficiently meet the varying needs of an area so diversified as that to which the code applies. In our opinion it is essential that there should be some machinery to enable variations to be introduced in procedure to meet the different requirements of different localities as well as to enable defects to be remedied as they are discovered without resort to the tardy process of legislation. We propose to make provision for these purposes by a re-arrangement of the Code. We recommend that matters of mere machinery should be relegated to rules capable of alteration by each High Court, subject to certain checks, and that those provisions only should be retained in the body of the Code in which some degree of permanence and uniformity is desirable."

Referring to this principle Sir C. P. Ilbert says (2) "The tendency of modern parliamentary legislation in England has been in the direction of placing in the body of an Act merely a few broad general rules or statements of principles, and relegating details either to Schedules or Statutory rules." But we should notice here that the causes which led to the adoption of this kind of legislation in England, are differ-

(1) *Report of the Special Committee to consider the amendment of the Civil Procedure Code of 1882*, dated, 31st August, 1907.

(2) *Legislative Methods and Forms*. Ch. III. p. 37.

ent from those which induced the British Indian Legislature to adopt this method in the Civil Procedure Code, 1908. In England "the increasing difficulty of passing complicated measures through the ordeal of parliamentary discussion" has led to the adoption of this kind of legislation, while in India it is not the increasing difficulty of passing complicated measures through the ordeal of discussion in the Legislative Council, but administrative exigencies e.g. to avoid resorting to the tardy process of legislation, have made this kind of legislation necessary. This difference arises from the nature of the constitution of the two legislative assemblies (1).

Another noticeable feature of the Anglo-Indian Procedure Codes is that the legislators have endeavoured to state general rules of procedure rather than to provide in detail for every possible contingency because excessive elaboration of details of Procedure tends to cramp the actions of the Court and in consequence to encourage technicalities (2)

Before leaving this subject I shall deal with the question of "referential legislation" or "legislation by reference". This expression is used in two different senses. In its widest sense it includes any reference in one Statute to the contents of another. In a narrower sense it means the application, not by express re-enactment, but by reference, of the provisions of one statute to the purposes of another (3). The Hindu Wills Act is an important piece of legislation of this kind in its narrow sense. Hindu Wills Act has not been drawn in the ordinary form of a Statute, or indeed of an Act of the Government of India. It does not enact a series of provisions relating to Hindu Wills, but, in point of form, it applies to certain Hindu Wills certain portions only of the Indian Succession Act, and it does this by mentioning only the numbers of particular sections and the numbers of particular parts or chapters or portions of parts or chapters of the principal Act. "But" says Pontifex J. (4) "can the Hindu Wills Act standing alone be called a Statute.

It is not even a skeleton of a Statute, but a mere heap of inarticulate dry bones, which require to be set up and clothed with the flesh of the Succession Act, before the Act itself can give forth any sound. Its preamble gives no

(1) See Lec. IX

(2) *Report of the Civil Procedure Code Special Committee*, dated August 31, 1907

(3) *Ilbert's Legislative Methods and Forms*, Ch. XI p. 254.

(4) *Cally v Chunder* (1882) 8C 378, 389, 391.

Lect. V.

intimation that it was expedient to give enlarged powers over their estates to Hindu testators It is not even called "An Act to amend and define the law of Hindu Testamentary succession" but simply "an Act to regulate the Wills of Hindus I repeat that it is in my opinion only the method of legislation which creates the difficulty." The original Bill to provide for the grant of Probates and Letters of Administration, following the course adopted in the Hindu Wills Act, incorporated by mere reference the sections of the Indian Succession Act which it was proposed to apply (1) But this mode of legislation was not approved by the Select Committee to which the Bill was referred by the Government of India "This mode of legislation," runs the Report of the Select Committee (2) "it has been strongly urged by several of the authorities consulted, is likely to render the Act less intelligible to many of those who will have to use it, and we have accordingly set out at length in the amended Bill now submitted all the sections of the Succession Act which it is intended should apply, and thus made the measure complete and self-contained "

Materials for
codification.

Law Reporting is, in a certain sense, a branch of legislation. Decisions of Superior Courts of Justice which endure the test of time and free discussion become additions to law (3)

(1) Law Reports.

The Judges of the old Supreme Court made no special effort to secure good reporting. Almost from the earliest institution of the Supreme Courts the decisions of those courts were left to the unassisted efforts of private reporters. Reports were no doubt published, some of them good, some of an inferior quality; and there were periods for which no reports at all existed, and during which many valuable decisions passed altogether unreported. After the establishment of the High Court of Calcutta, a Special Reporter was sanctioned for the Appellate side of the High Court, who was salaried by the Government, but it was not long before that arrangement broke down, and after various attempts to meet the desired object, the establishment of the Council of Law Reporting in Calcutta was encouraged. Still the Bengal Council for Law Reporting themselves ad-

(1) *The Gazette of India* Pt. V. June 28, 1879. p. 764.

(2) *The Gazette of India* Pt. V. February 14, 1880 p. 35. See also *The Gazette of India Supplement*, February 28, 1880, p. 556.

(3) See *Abstracts of Proceedings of the Council of the Governor-General*, Vol. XIV. p. 17. For further remarks see Lecture IX. Feasibility of further codification in British India, under heading "Materials for codification. Law Reports."

mitted that the result was not what they aimed at (1). Then LEC. V. the present Indian Law Reports Act was passed

The effect of reporting conflicting decisions in the Law Reports is not to aggravate such conflicts, but to accelerate their termination. For a long time a series of conflicting decisions on the effect of the law of limitation on suits for sale of mortgaged property had been passed by different High Courts. The Legislature did not intervene, for it was not clear that any intervention was necessary. It was only after many years that the point arose in a case of sufficient importance to bring it before the cognizance of the Privy Council which upheld the view of Calcutta High Court and then the Legislature intervened and settled the point as satisfactorily as possible (2)

Digests by private authors have been used as the ground-work of two important English Statutes viz. Chalmer's *Digest of the Law of Bills of Exchange* and Pollock's *Digest of the Law of Partnership*. The private author of a Digest in codified form, by adopting "Macaulay's invention of adding authoritative illustrations to the enacting texts of a code," can show in the clearest and shortest way the substance of the authorities on which his text is based. The general propositions of a Digest, before they become the ground-work of subsequent codes, can only be considered as law, in so far as they are correct and logical inductions from the decided cases which are cited in the Digest as illustrations, but as soon as the Digest is used as the basis of a code, the position is reversed and the cases decided before the Act are only law in so far as they can be shown to be correct and logical deductions from the general propositions of the Act (3). Such being the value of Digests, the scheme of making official Digests by way of preparation for codes, has been sometimes recommended. But this proposal has also been opposed by eminent authorities on the ground that a code is not more troublesome to make than a Digest and will be more useful when made (4). But so far as British India is concerned such official Digests will be of great value because private enterprise in this direction is very rare

(1) *Abstracts of Proceedings*, Vol. XIV pp. 26, 27.

(2) See *Objects and Reasons of Act IX of 1908* dated the 2nd January, 1908 §31 and Arts. 132, 147. *Vasudev v. Shivvasa* (1907) 30M 426, 11 CWN 1005, *Girvan Singh v. Thakur Narain* (1887) 14 C.730. See also, for another instance, *Abstracts of Proceedings* Vol. XIV p. 28.

(3) Pollock on *Partnership* 7th Ed. Preface.

(4) See the Symposium on the codification of English Law in the *New Century Review* for June, 1897. See also the *Law Quarterly Review*, Vol. XIII (1897) p. 240.

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Pollock's Digest
of Law of Torts.

True, there is the official Digest of the Law of Torts drawn up by Sir Frederick Pollock (1) still uncodified ; but this is so not because Sir Frederick Pollock's Draft is unsatisfactory or defective in any respect, but because "a considerable majority of opinions which have been collected from judicial and other officers in India are unfavourable to action " Objection based on the same ground was raised against the passing of the Indian Penal Code (2) Yet we know how successfully the Indian Penal Code has worked in this country and how it has been copied in several British possessions. The fact is that "to all appearance, the Indian Government has at last yielded to influences resembling those which in India pigeon-holed the Penal Code for more than twenty years " The fact of Sir Frederick Pollock's Draft Bill of Civil Wrongs not being accepted by the Government of India does not prove uselessness of official Digests in British India, on the other hand there are two main reasons why such Digests should be compiled in British India *Firstly*, because in India no enterprise can succeed unless it is supported by the Government of the country It was so at the beginning of the history of British power in India (3), is so now, and so shall it be, though not for ever, but for years to come Preparation of Digests means money and men and it is only the Government of the country which can command both Want of encouragement and means is the great obstacle in the way of private authors of Digests in this country. *Secondly*, if such Digests are published by the Legislative Department or Ministry of Justice, establishment of which has been suggested by several eminent writers, they, like the Punjab Civil Code of Sir Richard Temple, will be of greater weight and value than private Digests Within a short time of their publication, it can be easily ascertained how they have been received by the public. If well-received they may be used as the groundwork of future codes.

The drafts prepared by the different Indian Law Commissions are official Digest in a sense, so are also the drafts of the German and Japanese Civil Codes, which after prolonged discussion of their merits and demerits received the legislative sanction (4)

Other materials will be dealt with in Lecture IX.

- (1) Pollock on *Torts*, 8th Ed p. 587.
 (2) *Report of the Indian Law Commissioners*, dated, 23rd July, 1846, §§8-38.
 (3) *Marshman's Life of Carey, Marshman and Ward*, Vol. I p. 32.
 (4) See also Lects. IX, XI, XII.

Soon after the granting of the Charter of 1753 to the East India Company the Battles of Plassey and Buxar were fought and won and the East India Company gradually assumed the sovereign authority in this country. The Regulating Act, 1773 (13 Geo. III. c 63) laid down specific laws for the Government of India and for the appointment of a Governor-General and Council. The Council originally consisted of four (4) members, but Pitt's Act (24 Geo III sess 2 c 25) reduced this number to three (3) in 1784. Sections 36 and 37 of this Act empowered the Governor-General and Council to make and issue such Rules and Ordinances, and Regulations, for the good order and civil government of the Company's settlement at Fort William in Bengal, and all places subordinate thereto, as should be deemed just and reasonable, and not repugnant to the laws of England, provided that such Regulations should not be valid unless registered in the Supreme Court of Judicature to be established under that Statute.

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Machinery for codification.

Legislative Council.

In 1781 the Statute 21 Geo III c 70 empowered the Governor-General and Council to frame Regulations for the Provincial Courts, without having them registered in the Supreme Court. But they were unable to pass any Regulation which the Supreme Court was in any way bound to recognize, unless it was previously registered in that court as directed by the Act of 1773.

It was not till 1833 that the Registration of laws in the Supreme Court or any Court of Justice was rendered unnecessary (3 & 4 Wil IV c 85. §45).

It was not till the year 1800 that the Governor and Council of Fort St George at Madras was invested with legislative power.

"The right of the Government of Bombay to make Regulations had been held to stand infixed from, and to be recognized by the 11th section of the 37th Geo III. c 142; but it was more formally conferred by the 47th Geo III Sess 2 c.68 in 1807.

"It does not appear" says Cowell (1) "that the Governor-General exercised any direct authority over the Governors in Council at Madras or Bombay in the matter of making laws. He had control over them in political matters under the Act of 1773, and in Revenue matters under the Act of 1797. A copy of every regulation passed at Madras and Bombay was sent to the Governor-General in Council, but

(1) *Courts and Legislative Authorities in British India*, 5th Ed. p. 65.

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it does not appear that it was submitted for approval before being passed. The legislative powers of the Governor-General's Council were confined by the term of its constitution and in practice to the Presidency of Bengal."

Power of
taxation, 1813

In 1813 the Governor-General and the Governors in Council in their respective Presidencies, with the sanction of the Court of Directors and the Board of Commissioners were empowered to impose duties and taxes within the towns of Calcutta, Madras and Bombay.

Law Member.

The Charter Act of 1833 introduced important changes into the system of Indian administration (3 & 4 Wil. IV. c. 85). By the 39th section of that Act the superintendence, direction and control of the whole civil and military Government of the British territories and revenues in India became vested in the "Governor-General and Counsellors, to be styled the Governor-General of India in Council." By the next section it was provided that the said Council should consist of four ordinary members, instead of three as formerly and of these four, three should be or have been, servants of or appointed by the East India Company; and that the fourth should be appointed from amongst persons who should not be servants of the said Company by the Court of Directors, subject to the approbation of His Majesty; and that such member should not sit or vote in the said Council except at meetings thereof for making Laws and Regulation. This fourth member was the Law Member and Lord Macaulay was the first Law Member. Section 43 empowered the Governor-General in Council "to make laws and Regulations for repealing, amending or altering any Laws or Regulations whatever now in force or hereafter to be in force . . . and to make Laws and Regulations for all persons, whether British or Native, Foreigners or others, and for all courts of justice whether established by His Majesty's Charters or otherwise and jurisdictions thereof, and for all places and things whatsoever, within and throughout the whole and every part of the British territories in India, and for all servants of the said Company within the dominions of Princes and States in alliance with the said Company." Thus the legislative power of the Governor and Council of Bombay and Madras was taken away by this Act. "The restriction of the legislative power to a Council at the chief Presidency is undoubtedly a great improvement on the former plan, inasmuch as it secures uniformity in the system of legislation, and renders unnecessary the constant re-enactment of different Laws at the several Presidencies,

when such laws are applicable to the whole of British India" (1). It was not till 1861 that the legislative authority was given back to the Governors of Bombay and Madras. Section 48 provided "That all Laws and Regulations shall be made at some meeting of the Council at which the said Governor-General and at least three of the ordinary Members of Council shall be assembled (2) and that all other functions of the said Governor-General in Council may be exercised by the said Governor-General and one or more ordinary Member or Members of Council and that in every case of difference of opinion at meetings of the said Council where there shall be an equality of voices the said Governor-General shall have two votes or the casting vote "

The Charter Act
of 1833 (contd)

Quorum.

The difference in the *status* of the Law Member and other Members of the Governor-General's Council continued till 1853 when the Charter Act of that year placed the Law Member on the same footing with the other Members of the Council and was given the right to sit and vote at executive meetings. By that Act the Governor-General's Council was enlarged and besides the four "ordinary" members it had 6 "legislative" members. Thus the Legislative Council consisted of 12 members.

Charter Act 1853

12 Members

1. The Governor-General.
2. The Commander-in-chief.
- 3, 4, 5, 6. The four ordinary members of the Governor-General's Council
7. The Chief Justice of Bengal
8. A puisne Judge.
- 9, 10, 11, 12. Four representative members. (Each receiving a salary of £5,000 a year) from Bengal, Madras, Bombay and the N.-W. Provinces. Under the provisions of this Statute the meetings of the Legislative Council were made public and their proceedings were officially published. After the passing of this Statute (1853) bills were referred to select committees instead of a single member.

Even after the introduction of a single member from each local government in 1853, "Madras and Bombay complained of the enormous preponderance of authority which Bengal through her Council acquired over the sister Presidencies" (Cowell *Loc. IV* p 76). "There is no doubt"

(1) Morley's *Digest*. Introduction *clxiii*.

(2) Under §40 the Court of Directors were empowered to appoint the Commander-in-chief as an extraordinary member.

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says Lord Canning (1) "that the introduction of single member from each local Government has been a great advantage. But although an improvement has been thus made in the system antecedent to 1853, I do not think it has been carried far enough. I do not think that the principle of representing the local governments having been once admitted, the Governments of Madras and Bombay can be reasonably expected to be satisfied with the share which they at present have in any legislation directly concerning their own Presidencies, and I believe that by giving them a much larger share in it, careful local measures may be facilitated and expedited, without leading to any interference with measures of a general character, or with the authority and responsibility of the Governor-General in Council." To remove this objection "The Indian Councils Act, 1861" (24 & 25 Vic c 67) was passed. In introducing the Bill Sir Charles Wood (afterwards Lord Halifax) said (2) "Lord Canning strongly feels that although great benefits have resulted from the introduction of members into his Council who possess a knowledge of localities, the interest of which differs widely in different parts of the country; yet the change has not been sufficient in the first place to overcome the feeling which the other Presidencies entertain against being overridden, as they call it, by the Bengal Council; or, on the other hand, to overcome the disadvantages of having a body legislating for these Presidencies without acquaintance with local wants and necessities. This must obviously be possessed to a much greater extent by those residing on the spot. And, therefore, I propose to restore, I may say to the Presidencies of Madras and Bombay, the power of passing laws and enactments on local subjects within their own territories, and that the Governor of the Presidency in the same manner as the Governor-General, when his Council meets to make laws, shall summon a certain number of additional members, to be as before, either European or Native, and one-half of whom at least shall not be office-holders."

The Indian
Councils Act, 1861
(24 & 25 Vic C.67)

Its effect.

This Act (i) modified the constitution of the Governor-General's Executive Council, (ii) remodelled his Legislative Council, (iii) gave power to the Governors in Council in Bombay and Madras to make laws for the Government of those Presidencies (iv) and provided for the constitution of like legislative authority in Bengal, N.-W. Province

(1) Lord Canning's *Despatch* dated, 9th December, 1850
(2) *Hansard's Debates* Vol clixiii 639

(now the United Provinces of Agra and Oudh) and the LEC. V. Punjab.

By §3 a fifth Ordinary Member was added to the Governor-General's Council. Indian Councils Act, 1861.

For the purposes of legislation the Council consisted of 5 ordinary members and additional members. The number of additional members was not to be less than 6 nor more than 12, nominated by the Governor-General and holding office for two years; provided that not less than one-half of the persons so nominated shall be non-official persons i.e. persons not in the civil or military service of the Crown. Besides these the Lieutenant-Governor of a province was also to be an additional member whenever the Council held a legislative sitting within his Province

It was also provided that the Governor-General might make Ordinances having force of law in cases of urgent necessity but such an Ordinance would be valid only for six months (1).

According to the provisions of the Indian Councils Act, 1861 the Bengal Legislative Council was established in 1862 (17th January); N.-W. P and Oudh Council in 1886 (November 26); that for the Punjab in 1897 (April 9) that for British Burma in 1898. In 1912 when the Province of Behar was created, a Legislative Council was also given to that Province not under the Statute of 1861 but that of 1912. The Central Provinces and Assam also have now got their own Legislative Councils.

These local legislatures differ from those of Bombay and Madras which existed before 1833 on a very important point viz that before 1833 the Regulations of the Provincial Legislatures of Bombay and Madras did not require the sanction of the Governor-General, though they were sent to the Governor-General, they were not sent to him for his approval; while at the present time the local governments are bound to transmit copies of the different Acts passed by them to the Governor-General and no local law is of any value until it has received the assent of the Governor-General, who can veto any Bill passed by any local legislature (2). Up to the passing of the Indian Councils Act, 1861 the Executive Government made laws for the Non-Regulation Provinces by means of Circulars, Orders and Rules. Doubts

Difference between the old and present day Provincial Legislature.

Non-Regulation Provinces.

(1) 24 & 25 Vic c 67. §23

(2) Orissa Tenancy Bill passed by the Bengal Legislative Council in 1912 was vetoed by the present Governor-General of India. Some time ago the Doab Canal Bill of the Punjab Legislative Council was rejected in the same way.

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having been raised whether the Governor-General in Council could legislate for the Non-Regulation Provinces in that way, the doubts were removed by §25 of this Statute. Now the Council of the Governor-General possesses the sole Legislative authority for the Non-Regulation Provinces. Under the provisions of 33 and 34 Vic c 3 the Governor-General can make Regulations for the peace and good government of Non-Regulation Provinces

32 & 33 Vic. c.98. The Indian Councils Act, 1869 (32 & 33 Vic c 98) authorized the Governor-General's Council to make laws for all native Indian subjects of Her Majesty, in any part of the world

33 & 34 Vic c 3 A very important modification in the machinery for Indian legislation was made by the Government of India Act, 1870 (33 & 34 Vic. c 3) It was passed to enable the Governor-General of India in Council to make Regulations for the peace and good government of certain territories in India, otherwise than at meetings of his Legislative Council. In 1874 (37 & 38 Vic c 91) the number of ordinary members of the Governor General's Council was raised to 6, and the sixth member was to be appointed for public works purposes. The Indian Councils Act of 1904 (4 Ed VII c 26) removed the necessity for appointing him specially for public works purposes.

55 & 56 Vic c.14 The Indian Councils Act 1892 (55 & 56 Vic c 14) provided for an increase in the number of additional members of the Indian Legislative Councils. Section 1 of this Statute provides that the number of additional members of the Governor-General's Council nominated by him shall be such as to him may seem from time to time expedient, but shall not be less than 10 nor more than 16 That the number of additional members of Council nominated by the Governors of the Presidencies of Fort St George and Bombay respectively (besides the Advocate General of the Presidency or officer acting in that capacity) be such as to the said Governors respectively may seem from time to time expedient, but shall not be less than 8 nor more than 20 The Governor-General was also authorized to increase the number of members of the Legislative Councils of Bengal and the N.-W. Provinces (now the United Provinces of Agra and Oudh) by proclamation, provided always that not more than 20 shall be nominated for the Bengal Division and not more than 15 for the N.-W. P. and Oudh. This Act also empowered the local legislatures, with the previous sanction of the Governor-General to repeal or

alter Acts of the Governor-General's Council affecting Lec. V. their Province.

In the Regulations framed under §1 (4) of the Indian Councils Act, 1892 elective principles were recognized to some extent. The nominations to a certain number of seats on the Councils were made on the recommendation of certain specified public bodies and Associations. But it was not till the beginning of the Twentieth Century that elective principles were introduced to any appreciable extent into the Regulations laying down the rules for the election of additional members. This was done by 9 Ed VIII. c. 4. Section 1 of this Statute provides that the additional members of the Councils, for the purpose of making laws and regulations, of the Governor-General and of the Governors of Fort St George and Bombay, and the members of the Legislative Councils already constituted or which may be constituted, of the several Lieutenant-Governors of Provinces, instead of being all nominated by the Governor-General, Governor or Lieutenant-Governor in manner provided by the Indian Councils Act, 1861 and 1892, shall include members so nominated and also members elected in accordance with regulations made under this Statute. It also fixed the maximum numbers of nominated and elected members of the different Legislative Councils. It also created an Executive Council in Bengal and provided that the number of members of the Executive Council of Bombay, Madras and Bengal was not to exceed 4.

9 Ed VIII. c. 4.
1909.

The Government of India Act, 1912 (2 and 3 Geo. V) affected the *status* of the Bengal Division of the Presidency of Fort William. Behar and Orissa were taken out of the Bengal Division of the Presidency of Fort William and were placed under one Lieutenant-Governor, and Bengal (including Eastern and Western Bengal) was raised to the *status* of a Presidency under a Governor with an Executive Council (1)

Now a days certain local authorities have got the power to make Rules for certain purposes. The Rules framed in the exercise of this right have the force of law and are taken as part of the Act conferring the rule-making power (2)

The General Clauses Acts contain only a portion of law

(1) See Lec. IV. for changes introduced by this Statute. See also Appendix B.

(2) See Lec. VI.

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Interpretation
of Statutes

on this subject (1) Most of the rules relating to this subject are to be gathered from judicial decisions and some of the important ones will be given in this lecture.

Where the law has been codified it is of little avail to enquire what is the law apart from such codification, but the judges must look to the Code itself as their guide (2).

Proper mode of
dealing with an
Act intended to
codify a particular
branch of the law.

"I think," says Lord Herschell (3), "the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions.

Consideration
of previous Law

. . . I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Code . . . What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground "

It is well-settled that, although a repealed statute has to be considered, as if it had never existed, this does not prevent the Court from looking at a repealed Act *pari materia* on a question of construction (4).

In construing an Act we are to read the words in the light of the object of the Act and are to presume that a consistent purpose underlies those words (5).

(1) See Lecture VI under heading "Preliminary part of the Code Interpretation of Statutes",

(2) *Burn & Co v McDonald* (1908) 36 C. 354, 364.

(3) *Bank of England v Vagliano* (1891) A.C. 107, 111. *Noendra v. Kamal* (1896) 23 I.A. 18, 26

(4) *Exparte James Lund Copeland* (1852) 2DeG M & G. 914 ; *Baleshwar v. Bhagvathu* (1908) 35 C. 701, 711, *Bell v. The Municipal Commissioners for the City of Madras*, (1902) 25M. 457, 500.

(5) *Secretary of State v Gajanan* (1911) 35B. 362, 367 s.c. 13 Bom. L.R. 273 (Civil Procedure Code).

Where a later Act of Legislature does not purport or L.R.C. V. affect to supersede an earlier Act, the Court will endeavour to read the two enactments together, and to avoid conflict if possible (1)

No general rule can be laid down to determine whether a provision in a statute is absolute or directory, and although the language used may be mandatory, it is by no means conclusive (2).

In construing a Statute which affects the liberty of the subject, the Courts should not only adopt the natural and ordinary construction, but should construe strictly expressions occurring therein (3). Statutes affecting liberty of subjects. It is a well-settled principle of interpretation that no statute is to be construed to take away private right of property, unless such an intention appears by *express words*, or by necessary implication (4).

An Act or Statute imposing penalties must be construed strictly (5), and when its language is ambiguous, it should be construed in the manner most favourable to the liberties of the subject, this is more specially so when the penal enactment is of an exceptional character (6) Construction of Penal Statutes Criminal enactments are not to be extended by construction and when an offence against the law is alleged, and when the Court has to consider whether the alleged offence falls within the language of a criminal statute, the Court must be satisfied not only that the spirit of the legislative enactment has been violated, but also that the language used by the Legislature includes the offence in question and makes it criminal (7).

Although an offence is expressly made punishable by a special or local law, it will also be punishable under the Penal Code, if the facts come within the definitions of the Code (8) Interpretation of Codes Criminal Codes. But when an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under any of those enactments, but shall not be liable to be punished twice for the same offence (9)

When an act or omission is made penal by two Acts,

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- (1) *Rangacharya v Dasacharya* (1912) 37 B. 231.
 (2) *Levina Ashton v Madhabmani* (1910) 14 C.W.N. 560, 568
 (3) *Bissumbhur v Queen Empress* (1900) 5C.W.N. 108.
 (4) *Umacharan v Ajadannissa*, (1885) 12C. 430, 433
 (5) *Jetha v Ram Chandra* (1892) 16 B. 689, 694, *Emp v Kola Lalang*. 8C 214 See also Beal's *Cardinal Rules of Legal Interpretation*, p. 443 2nd Ed
 (6) *Reg. v Bhisla Bui* (1876) 1B. 308, 311.
 (7) *Britt v Robinson L. R. 5 C P 503, 513*
 (8) *Reg v Rama* (1883) 6M. 249
 (9) Act X of 1897 §26 *General Clauses Act*.

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one general and the other special, it is desirable that the sentence should be passed under the special Act (1).

When there is an intention to apply the provisions of the general criminal law to acts authorized or required by particular statutes, that intention is always made clear by express words to that effect (2). Instances of this may be found in the Cess Act (Beng. Act IX of 1880) §94; in the Estates Partition Act (Beng. Act VIII of 1876) §148, in the Income Tax Act (II of 1886) §§35, 37, in the Land Acquisition Act (I of 1894) §10; in the Bengal Excise Act (V of 1909) §42 (1) (d) and §50.

Special and
General Acts

The general rule on this point is that a statute prescribing rules for special subjects is not controlled by subsequent legislation of a general character (3). But the operation of this rule may be precluded in regard to particular enactment either by express legislation or by the inference which may be drawn from the character of a special enactment as a complete Code or otherwise (4).

Interpretation of
Statute incor-
porated by
reference

Where a statute is incorporated by reference into a second statute, the repeal of the first by a third does not affect the second. Section 13 (c) of the *Dekkhan Agriculturists' Relief Act* (XVII of 1879) incorporates by reference Section 257 A of the Civil Procedure Code of 1882 (XIV of 1882) and the repeal of §257 A of the old Civil Procedure Code has not the effect of repealing §13 (c) of the *Dekkhan Agriculturists' Relief Act* (5).

The canons of construction which have long been applied in construing English Acts of Parliament may be applied to many but not to all the Acts of the Government of India. "Hence," says White J. (6) "in construing an Act of the Government of India passed in the form peculiar to the Hindu Wills Act, I think the sound rule of construction is to give their full and natural meaning to the provisos, and only to give effect to the enactments contained in the applied sections and chapters, so far as the latter do not contravene the full and natural meaning of the provisos; and that this is the sound rule of construction, although the

(1) *Kuloda v The Emperor* (1906) 11 C.W.N. 100.

(2) *Chandi v Abdul Rahman* (1894) 22 C. 131, 139.

(3) *Abergavenny v. Brace* L.R. 7 Ex. 170, *Kamalammal v Peeru* (1897) 20 M. 481.

(4) *Veeramma v Abbiah* (1891) 18 M. 99, 104 (*Limitation Act and Registration Act*) followed in *Abdul v. Latifun* (1913) 30 C. 532. But not followed in *In re Land Acquisition Act* (1905) 30 B. 275, 288. This divergence of views may be removed only by the Legislature.

(5) *Trimbak v. Abaji* (1911) 35 B. 307. See also §§6-8 Act X of 1897.

(6) *Alangamonjari v. Sonamoni* (1882) S.C. 637, 641.

result of carrying it out may bethat some of the applied sections are rendered nugatory.. . . . To construe such be to introduce changes into the Hindu Law by a side wind an Act by the canon laid down in the case cited (1) would as it were, and also when there is no clear expression on the part of the Legislature of an intention to alter that law " The difficulty in construing the Hindu Wills Act arises "from the mode of legislation," from the way in which upwards of 150 sections of the Indian Succession Act have been imported into § 2 of the Hindu Wills Act without sufficient consideration, as to whether some of those sections, which were quite appropriate in the first Act, were equally so in the second (2)

When an Indian Act extends to India the provisions of an English Act, English decisions on that Act may be referred to as a guide in construing the Indian Act (3) In construing section 39 of the Indian Contract Act English decisions have been referred to as useful guides in determining what amounts to a "refusal" under that section (4).

Reference to
English decisions

"No doubt," says Edge C J (5) "cases frequently occur in India in which considerable assistance is derived from the consideration of the law of England and of other countries In such cases we have to see how far such law was founded on common sense and on the principles of justice between man and man and may safely afford guidance to us here." Even where a matter has been expressly provided for by any Act, recourse may be had to English or American cases if the particular provision be ambiguous owing to the obscurity or incompleteness of the language used in the Act (6)

There was a good deal of difference of opinion in this country on the question whether proceedings of the Legislative Councils can be referred to, during a trial, but now this question has been settled by the authoritative decision of the Privy Council (7). It has been held that the proceedings of the Legislature in passing a

Proceedings of
Legislatures.

(1) *Reg v. Bishop of Oxford*, L. R. 4 Q. B. D. 245.

(2) *Alangamonjari v. Sonamoni* (1882) 8C. 637, 642 per Garth C J ; *Subba Reddi v. Doraisami* (1906) 16 M.L.J. 491, 497.

(3) *Thakur Ganesh v. Thakur Harihar* (1904) 31 I. A. 116, 120.

(4) *Rash Behari v. Nitya* (1906) 33C. 477, 481.

(5) *The Collector of Gorakhpur v. Palakdhari* (1889) 12 A. 11, 12 See also pp. 19, 20 for remarks of Straight J.

(6) See Woodroffe on *Evidence*, 5th Ed. Intro. p. 8 Concerning the weight to be attached to American decisions see remarks of Lord Cockburn in *Scaramanga v. Stamp*. 5 C.P.D. 295, 303 Calcutta Law Journal, January, 1911.

(7) *The Ad. General of Bengal v. Prem Lal*. (1895) 22 I. A. 107, 22C. 788, 799.

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statute are excluded from consideration on the judicial construction of Indian, as well as of British Statutes (1). This ruling overrules the rule laid down in three Full Bench cases of the Calcutta High Court (2). In the last of these cases Pigot J. said "It would, therefore appear that unless these two Full Bench decisions are overruled, . . . that the right of a judge to refer to some of the proceedings of the Legislative Council in order to arrive at the intention of the Legislature, cannot now be questioned in this Full Bench" (3). In *Queen Emp. v. Bal Gangadhar* (4) counsel was allowed to read passages from Sir James Stephen's speech as part of his address, and as stating his own argument in words which the Counsel adopted as his own, but he was not allowed to cite them as Sir James Stephen's opinion and as authority showing the construction to be put upon the section under which the accused was charged. Publication of the Objects and Reasons, debates in Council (5) and Reports of Select Committees (6) being part and parcel of the proceedings of the Legislative Council cannot be referred to as authority.

Objects and
Reasons

In *Moosa v. Essa* (7) Sargent C J held that objects and reasons may be referred to in construing an Act "I think," says Sargent C J "they may be regarded as in the same position as the documents permitted to be used in that case. I would, however, myself base my decision rather on the established practice of this court, where it has for many years been our custom, in cases like the present, to refer to the objects and reasons presented to the Legislature . . . considering that these objects and reasons are really the formal statement made by the Legal Member of Council, who introduced the Bill, I think we cannot refuse to allow them to be used "

(1) *Ibid* See also *Queen Emp. v. Balgangadhar* (1897) 22B 112, 126-128

(2) *Moothoori v I G. S N. Coy* (1883) 10C 166 *Queen Emp. v Kartic* (1887) 14 C. 721 *Fadu v Gowri* (1892) 19C 544.

(3) *Fadu v. Gour.* (1882) 19C 544, 569.

(4) (1897) 22B. 112, 128.

(5) *Queen Emp. v. Balgangadhar* (1897) 22B 112, 126 ; *Maharaj v. Har.* (1903) 26A 144, 147.

(6) *Kadri v Bhawani* (1892) 14A 145. But such reports were referred to in *R v Kartic* (1887) 14C. 721, 728. *Mahomed v. Ahmed* (1887) 15C. 139 , *Ramesh v Hiu* (1890) 17C 852, 860 ; *Ram v Har* (1892) 16M. 207, 210

(7) (1884) 8B. 241, 247 following *In re Mew* 31L.J. Bankey, 87. See also *Moothora v. I G. S. N Coy* (1883) 10C. 166, 192, 193.

In *Fadu v. Gour* (1). Prinsep J. referred to the objects and reasons of the Specific Relief Act but doubted whether such reference is legitimate. But in *Kadi v. Bhawani* (2) the Allahabad High Court declined to look at the objects and reasons. "It appears to me that when a court has to put a construction on a Statute, whether of the Imperial Parliament or of the Legislative Council of India, it is the Statute alone to which the court is entitled to look. . . . If one were to refer to such debates and reports in order to ascertain the true construction in law of a Statute finally passed by the Legislature, it would be necessary to see whether any alteration took place between the time of the debate or the report and the final passing of the Bill into statute law, and one would be construing the language of the report or the debate and not that of the Statute. . . if judges were to allow their minds to be influenced in the construing of a statute by debates in Parliament or reports of select committees or other bodies on the bill, statute-law would be reduced to confusion, and instead of there being one principle of construction of statutes well understood by lawyers, the construction of statutes would be reduced to no principle at all" (3). Now the point has been settled in the negative by the Privy Council (4). Under that ruling the draft stages of a Bill cannot be referred to (5). In *Taucek v. Prosono* (6) Reports of Law Commissioners. Couch C. J. ruled that Acts cannot be interpreted by Reports of Law Commissioners. But in *Queen Emp. v. Kartic* (7) Petheram C. J. in construing §54 of the Indian Evidence Act referred to such reports. It is necessary that the Legislature should decide the point one way or the other. If the words of any section admit of any reasonable doubt the title of the Chapter in which the section has been put may be looked to (8). Title of a chapter.

(1) (1892) 19C. 544, 551 p. 569 per Pigot J. But now see *Ad. Genl. of Bengal v. Prem* (1895) 22I A. 107, 118 s.c. 22C 788, 799

(2) (1892) 14A. 145, 149, 150 per Ridge. C. J.

(3) *Kadi v. Bhawani* (1892) 14A. 145, 149 for remarks of Straight J. see p. 153.

(4) *Ad.-Genl. of Bengal v. Prem Lal* (1895) 22 I A. 107, 118. See also *Queen Emp. v. Balgangadhar* (1897) 22B. 112, 126-128.

(5) *Ad.-Genl. of Bengal v. Prem Lal* (1895) 22I A. 107, 118. See also *Shaik Moosa v. Shaik Essa* (1884) 8B 241, *Queen Emp. v. Kartic* (1887) 14C. 728 where the draft Bill of Evidence Act was referred to.

(6) (1873) 19W.R. 48, 53.

(7) (1887) 14C. 721, 728, 729. See also *Ramesh v. Hiru* (1890) 17C. 852, 859. *Queen Emp. v. Ghulet.* (1884) 7A. 44, 51.

(8) *Eastern Counties etc. Companies v. Marriage* (1860) 9H L. Ca. 32, *Reg. v. Krishna* (1868) 5 Bom. H.C.R. Cr. Ca. 69, 72. (Criminal Pro. Code); *Krishnappa v. Panchappa* (1869) 6 Bom. H. C. 258, 260; *Sah Mukhun v. Sah Koondun* (1875) 15 B.L. R. 228, 234. (P. C.)

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Preamble.

The preamble is undoubtedly a part of the Act, and may be used to explain it ; and is, as Lord Coke says "a key to open the meaning of the makers of the Act, and mischiefs it was intended to remedy ; but, on the other hand, although it may explain, it cannot control the enacting part, which may, and often does, go beyond the preamble" (1)

Reading of one section together with another.

In considering the effect to be given to a section of any Act, it may be read in conjunction with another section (2)

Schedule.

A schedule is a part of the Act to which it is annexed (3).

Heading of sections

The phraseology of the heading of the sections cannot control the wording of the section. The heading stands on the same footing as a preamble, and may be referred to for guidance if the meaning of the section is obscure (4).

Illustrations

The illustrations, although attached to, do not in legal strictness form part of, the Acts, and are not absolutely binding on the courts. They merely go to show the intention of the framers of the Acts, and in that and in other respects they may be useful, provided they are correct (5) The illustrations are only intended to assist in construing the language of the Act (6). The illustrations ought never to be allowed to control the plain meaning of the section itself, and certainly they ought not to do so, when the effect would be to curtail a right which the section in its ordinary sense would confer (7) In the last case Garth C. J. held that illustration (b) to §26 (Act XV of 1877) went beyond the terms of the section itself, and the Legislature has omitted this illustration in the present Limitation Act. (IX of 1908) The illustrations of the Penal Code rank as cases decided upon its provisions by the highest authority But as every authority may sometimes err the court is justified in examining whether

(1) *Salkeld v. Johnson* (1848) 2 Ex. 256, 283 per Pollock C B : *Chinna v Mahomed* (1865) 2 Mad H C 322. See also Beal's *Cardinal Rules of Legal Interpretation* 2nd Ed pp. 253-260

(2) *Sah Mukhun v. Sah Koondun* (1875) 15 B L R. 228, 234 (P.C.)

(3) *Dutt v. Khedu* (1911) 33A 645, 646

(4) *The Municipal Commissioner for the city of Bombay v Muncherji* (1911) 36B. 405, 414.

(5) *Nanak Ram v. Mehin Lal* (1877) 1A. 487, 495 *Dubey v. Ganesh* (1875) 1A. 34, 36. See Lecture IV for Macaulay's remarks on use of illustrations.

(6) *Shah Omed v. Nidhee Ram* (1874) 22W.R. 367, 368 per Couch, C J. See also *Sooltan Chund v Schiller* (1878) 4C. 252, 256

(7) *Koylash v. Sonatun* (1881) 7C. 132, 135 (*Limitation 1st illustrations to §26 Act XV. of 1877.*) See also *Kamalammal v Peeru* (1897) 20M. 281, 183, (*Contract Act §73 illus. (n) and Act XXXII of 1839.*)

the highest authority has erred in inserting any illustration (1) L.E.C. V.

The effect of an interpretation clause is to give the meaning assigned by it to the word interpreted in all places of the Act in which the word occurs. But it is by no means the effect of an interpretation clause that the thing defined shall have annexed to it every incident which may seem to be attached to it by any other Act of the Legislature (2) Interpretation Clause.

During the period 1833-1854 Bills were passed through the Council of the Governor-General and into law without the addition of side-notes to the clauses. That practice was changed with Act XV of 1854 (Borneo Commission Act) and since then side-notes have regularly been added to all Bills as introduced and have remained in them during their passages through Council and into law. This practice seems to follow the precedent set in England, where the side-notes of Acts (since 1849) usually appear on the Rolls of Parliament. The side-notes which now appear in connection with the earlier Acts, have been added since their enactment and can lay no claim to have the authority of the legislature. The question whether side-notes are to be taken as parts of the Acts or not has been answered in the negative. It is now well-settled that marginal notes to the sections of an Act cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago (3). In *Ad. General of Bengal v. Prem* (4) and *Dukhi v. Halway* (5) Calcutta High Court, while holding that marginal notes formed no part of an enactment, appear to have referred to the same on the question of construction. But the Privy Council in *Thakurain Bulraj v. Rae Jagat Pal* (6) has ruled that such notes cannot be referred to on the question of construction. Marginal notes.

The official translation of an Act has no legislative force or sanction (7). Official translation of Acts.

(1) *Reg. v. Rahmat.* (1876) 1B. 147, 155.

(2) *Umacharan v. Ajadammissa* (1885) 12C. 430, 433.

(3) *Thakurani Balraj v. Rae Jagat Pal* (1904) 31 I.A. 132, 142, 26A 393, 406, 8C WN 699, *Punardeo v. Ram Sarup* (1898) 25C. 858, 862. *Emp v. Alloomiya* (1903) 28B. 129, 142. In *Kameshwar v. Bhikhan* (1893) 20C. Pigot J. expressed a different view. See also Maxwell on *Interpretation of Statutes* 3rd Ed. pp. 58, 59. Craies' *Statute Law*. p. 196. 2nd Ed.

(4) (1894) 21C. 758.

(5) (1895) 23C. 55, 59.

(6) (1904) 31 I.A. 132, 142.

(7) *Jetha v. Ramchandra* (1892) 16B. 689, 698. *The Collector of Broach v. Venilal* (1896) 21B. 588, 594.

LECTURE VI.

PROGRESS OF CODIFICATION IN BRITISH INDIA.

Classification of
Law for Codification.

In Roman jurisprudence law has been classified under three heads, viz., (a) law of persons, (b) law of things and (c) law of actions, and this classification has been followed in all codes based on Roman law, but in modern jurisprudence law is generally classified according to the nature of rights. Rights and duties are correlative terms: there are no rights apart from duties. Without some kind of duty there can be no right, and nothing on which a court of justice can pass judgment. The laws of every country define and regulate the duties (enforceable in courts of justice) of all persons subject to them, and consequently the corresponding rights. But law does not consist of a number of self-contained and mutually exclusive propositions which can be arranged in a rigid frame work, and we cannot classify law into divisions which will be mutually exclusive. In 1872 the then Law Member Sir James Stephen (1), with reference to codification divided law into three parts:—(a) *current miscellaneous legislation*, meaning thereby such measures as were necessary to meet particular cases; all financial legislation, acts relating to emigration, telegraph and Legal Practitioners Act &c &c. were included under this head. (b) *Procedure* (i) civil (ii) criminal and (iii) revenue. (c) *Substantive Law* (i) Government (ii) criminal law. (iii) Laws relating to inheritance. (iv) Laws relating to the relations of life. Husband and wife, parent and child, master and servant guardian and ward (v) Laws relating to contract (vi) Laws relating to wrongs. (vii) Laws relating to the enjoyment of land. In 1879 Sir James Stephen in his memorandum dated July 2, 1879 said that the general plan of operation should be to pass into law a certain number of enactments but that the proposal to arrange them scientifically should be laid aside. Sir Henry Maine also concurred with Sir James Stephen in considering that a provisional convenience was the utmost that could be claimed for the so-called method of 'scientific' arrangement followed or proposed to be followed by the authors of the Anglo-Indian codes. The

(1) *Supplement to the Gazette of India*. May 4, 1872. p. 530.

Commission appointed in 1879 recommended that the process of codifying well-marked divisions of substantive laws should be continued and that the eventual combination of those divisions as parts of a single and general code should be borne in mind. The best order for a code is, according to Sir F. Pollock, that which makes it most useful to practitioners, who have to deal with it, and not necessarily that which would make it easiest to follow to a person ignorant of the subject and he divides it into three parts, the *first part* or the general or preliminary part of a code should contain the rules of law which will show what persons are capable or fully capable of rights and duties, for all human beings cannot be treated as equally capable (e.g. children, lunatics &c.) Then the legal capacity of persons may be extended, as in agency and formation of corporations. The general consequences which flow from the very nature of an artificial person, as distinct from the rules governing the constitution and powers of trading companies or other particular kinds of corporations, have to be considered under this head. This part should also contain the "Legislative Dictionary" which not only produces greater clearness and intelligibility in the different Acts, but also contributes to the attainment of uniformity in our laws and save expense by the exclusion of many provisions necessarily inserted in different Acts in the absence of such an enactment. The law of construction is an important auxiliary branch of law and the Fourth Indian Law Commission recommended the preparation of a systematic chapter on Interpretation.

The *second part* of a code should include substantive law and the law of relief. "I understand by substantive law" says Sir James Stephen "those branches of the law which relate to and regulate the common relations of life, relations which continue unchanged under all circumstances." The law of rights, duties and remedies together with the necessary auxiliary rules is generally called substantive law by modern jurists. Though all laws exist for the sake of the common weal, and all legal duties must be duties of some person, yet some rules and heads of law seem to have regard in the first place to the safety or welfare of society as a whole, and others to be concerned with the rights of individual citizens, the former are called public law and the latter private law. Public law again according to Sir F. Pollock may be roughly subdivided under the following heads, (a) constitutional (including the judicial system). (b) Re-

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A First Part of Code

General and Preliminary

B Second Part. Substantive law.

I. Public Law.

- LEC VI. gulative and administrative It includes the Acts intended to safeguard the public welfare and interest partly by direct action of the state and partly by controlling the conduct of bodies and persons in matters lawful in themselves, but having incidents and results that may lead to public inconvenience (c) Criminal Sir F Pollock, taking Mr Justice O. W Holmes as his guide, has classified private law into —
- B Substantive law
- II Private Law.
- (a) Civil wrongs
 - (b) Property. Conveyance and succession
 - (c) Contract —Mercantile law —Companies Bankruptcy The law of bankruptcy, though its effects are not now confined to traders, is in substance a special branch of remedial law and procedure annexed to the law merchant
 - (d) Trusts
 - (e) Family relations.

The law of trusts has many elements in common with the law of contracts, and Prof. Holland has classified it as a branch of the law of contract, but according to Sir F Pollock it stands on a different footing Then, again, the law of intestate succession is, in countries where the law of intestate succession has shrunk to almost rudimentary dimensions, treated as an appendix to the law of property and conveyancing, but in India it forms a large portion of Hindu and Mahomedan law, and should be treated in its proper place, viz, as a branch of the law of family relations. The relation of master and servant was formerly analogous to the family relations, but now it is treated as founded on contract. Legal duties are not always fulfilled and it is necessary that there should be ways and means for the enforcement of such duties and the satisfaction of just claims, in other words, law deals with remedies as well as rights. In some cases what form of redress is available, is a far more practical question than whether any right has been violated. There are different kinds of remedies The consequences of wrong-doing, default or error are different according as it is a case for punishment, or for redress to the person injured or for both. Then again when there is private redress only, the consequences differ according as it takes the form of restitution or specific performance or of compensation in money. The law of relief occupies a middle ground between Substantive Law and Procedure and so I have put it here.

- III. Relief.
- C. Adjective law. liabilities or what is legal justice, we must know how to get justice done by the proper court. The rules which fix the manner and form of administering justice are called the

rules of Procedure or Adjective law Procedure "denotes LEC. VI. the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the court is to administer—the machinery as distinguished from its product." (1).

"Procedure" says Lord Penzance (2) "is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve." Under the head "Procedure" I shall include all rules of law which regulate the proceedings and powers of Courts of justice and the assessment and collection of the land revenue. So far as the powers and proceedings of the courts of justice are concerned the Civil and Criminal Procedure Codes, the Civil Courts Acts, the Evidence Act, the Limitation Act and the Registration Act have codified the law on those subjects. As to the Revenue Procedure the law is contained in the Regulations and the different local Acts.

The Statute book of India is composed of

- (1) Such Acts of Parliament as extend, expressly or by implication, to British India. Also orders in Council made by the King in Council and applying to India. Contents of Indian Statute Book
- (2) The Regulations made by the Governments of Bengal, Bombay and Madras, before the passing of the Government of India Act, 1833 (3 & 4 Will IV c.85).
- (3) The Acts passed by the Governor-General in Council since 1834. Also Rules, Orders, Regulations, By-laws, and Notifications made under the authority of English Statutes and Indian Acts.
- (4) Acts passed by the local legislatures of Bombay, Madras, Bengal, the United Provinces of Agra and Oudh, the Punjab, Burma since their constitution.

(1) *Poyser v Minors* (1881) 7 Q B D 333 per Lush L. J. "Procedure" is sometimes synonymous with 'Practice,' but Practice is usually confined to minor details within a given form of procedure.

(2) *Kendall v Hamilton* (1879) 4 Ap. Cas 504, 525; *Chhavamanessa v. Basirar* (1910) 37C. 399, 404, per Mookerjee J.

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- (5) The Regulations made by the Governor-General under the Government of India Act, 1870 (33 Vic. c. 3).
- (6) The Ordinances, made by the Governor-General under § 23 of the Indian Councils Act, 1861 (24 & 25 Vic. c. 67) and for the time being in force. Rules, laws and regulations made by the Governor-General or the Governor-General in Council for non-regulation provinces before 1861, and confirmed by § 25 of the Indian Councils Act, 1861

Indian Statute
Book.

Almost all these Enactments, Rules, Regulations and Notifications are to be found in

- (1) 2 Volumes of English Statutes relating to India (1698-1899)
- (2) 6 Volumes of General Indian Acts of the Council of the Governor-General of India (up to the end of the year 1908)
- (3) 11 Volumes of Provincial Codes.
- (4) 4 Volumes of General Statutory Rules and Orders. Made under enactments in force in British India. These volumes contain (a) Certain Orders of the Crown and Orders of the Secretary of State which are of direct or special importance to India e.g. The Letters Patent of the Chartered High Courts and the regulations made under the Naturalization Acts. There are also a few Orders in Council made by the King in Council e.g. an order by the King in Council, dated 7th March, 1904 (published in the Gazette of India 1904. Pt I 363) declaring that ch. II. of the Indian Extradition Act, (XV of 1903) shall have effect in British India as if it were a part of the Extradition Act, 1870 (33 & 34 Vic. c. 52. See Vol. III. p. 1829 of the General Statutory Rules & Orders). These volumes also contain the Statutory rules made in India under the authority of (a) English Legislation (b) Indian Legislation. These volumes contain the General Statutory Rules and Orders issued up to the end of the year 1909.
- (5) 2 Volumes of the Bengal Local Statutory rules and orders down to the end of the year 1902. These two volumes supersede the "compilation of Notifications and Orders of the Government of Bengal having the force of law" published in

1884. These volumes contain the Statutory rules LEC. VI.
and orders issued under

- (a) the Statutes of Parliament (applicable to Bengal)
 - (b) the Acts of the Governor-General of India in Council, Indian Statute Book.
 - (c) the Acts of the Bengal Legislative Council.
- (6) 2 Volumes of Local Rules and Orders made under enactments applying to Bombay. First volume contains Rules and Orders applying to Bombay exclusively and made under
- (i) Statutes of Parliament and
 - (ii) General Acts of the Governor-General of India in Council.

The second volume contains similar rules and orders under

- (iii) Bombay Regulations.
 - (iv) Local Acts of the Governor-General in Council.
 - (v) Acts of the Local Legislative Council
 - (vi) Regulations made under the Statute 33 Vic. c. 3.
- (7) The Central Provinces List of Local Rules and Orders.
- (8) Madras List of Local Rules and Orders.
- (9) Eastern Bengal and Assam List of Local Rules and Orders. (After April 1912 for Assam only)
- (10) The Punjab List of Local Rules and Orders
- (11) United Provinces List of Local Rules and Orders
- (12) Burma Rules Manual.

These different classes of enactments have been divided into three groups by Sir C. P. Ilbert according to their origin in the following way (1) :—

(A) ENGLISH LEGISLATION—

- I. Acts of Parliament.
- II. Orders in Council made by the King in Council.

(B.) INDIAN LEGISLATION—

- III. The old Bengal, Madras, and Bombay Regulations.
- IV. Acts of the Governor-General in Council.
- V. Regulations made by the Governor-General in Council under the Government of India Act, 1870.

(1) *Legislative Methods and Forms.* p 174. (Ch IX)

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- VI. Ordinances made by the Governor-General in Council.
- VII. Acts of Local Legislative Councils.
- (C.) DERIVATIVE LEGISLATION—
- VIII. Statutory Rules &c. made in India under the authority of English legislation.
- IX. Statutory Rules and Orders, Regulations, By-laws and Notifications made under the authority of Indian legislation.
- X. Rules, Laws, and Regulations made by the Governor-General or Governor-General in Council for "non-regulation provinces" before 1861, and confirmed by §25 of the Indian Councils Act, 1861.

More than thirty years ago Sir James Stephen remarked that the proposal to arrange the British Indian enactments scientifically should be laid aside for some time ; and since then nothing has been done in that direction. The present state of law in this country is that certain branches of law have been codified, some partially dealt with by the Legislatures and others have been left untouched by the Legislatures. Following the classification of law given above we shall see what progress has been made in the different branches of law mentioned in that classification

A General or Preliminary part of the Code.
I. Infants.

Law relating to Minors has not been codified yet. Trevelyan's *Tagore Lectures on Minors*, when digested, will form a very good ground-work for a code. Though the personal laws of Hindus and Mahomedans are included within this branch to some extent, British Indian Legislature have partially modified the law by different Acts e.g the Indian Majority Act.

The following Acts and portions of Acts may be consolidated and put in this part of the code.

- (i) *National status of married women and infant children in this country.* 33 & 34 Vic. c. 14 §10 and 58 and 59 Vic. c. 43.
- (ii) *The Guardians and Wards Act* (VIII of 1890).
- (iii) *The Indian Majority Act* (IX of 1875) amended by Act VIII of 1890 §52. (1).
- (iv) *The Court of Wards Act.* (IX of 1879 B.C.).

Section 2 of this Act lays down that nothing

(1) Before the passing of Act IX of 1875 there were several Acts fixing the age of majority for the special purposes of such Acts e.g Succession Act (X of 1865) §3, applied to the Hindus by the Hindu Wills Act (XXI of 1870) §6—The Limitation Act (IX of 1871) §3—The Government Savings Bank Act (V of 1873) §3—Indian Christian Marriage Act, (XV of 1872) §3.

contained in this Act shall affect (a) the capacity of any person to act in the following matters viz marriage, dower, divorce and adoption ; (b) the religion or religious rites and usages of any class of His Majesty's subjects in India ; or (c) the capacity of any person, who, before this Act came into force, had attained majority under the law applicable to him. It has been observed that this reservation refers only to the capacity to contract, which is limited by §11 of the Contract Act, and not to the capacity to sue, which is purely a question of procedure and regulated by the Civil Procedure Code(1). But it should be noted that the Majority Act does not use the expression "capacity to contract" but "capacity to act" which is of much more wider import (2)

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1 Infants.

- (v) *Indian Contract Act* §§11 (portion relating to minors), 183, 184 (Agency) ; 247, 248 (Partnership).
- (vi) *Civil Procedure Code* (V of 1908) ord XXXII rr. 1-15.
- (vii) *The Presidency Small Cause Courts Act* §32 (mentions when minors may sue as if of full age).
- (viii) *Penal Code and Acts dealing with crimes*.— §§82,83 of the Penal Code together with §130 of Act IX of 1890. (The Indian Railways Act) Penalty for buying or taking pledge from a child (Mad Act III of 1888 §66 ; Bom. Act IV of 1902 §117 ; Beng. Act IV of 1866 §54) in the Presidency Towns under the respective Police Acts.
- (ix) *Torts*—The law of torts being uncodified in this country, the question of minors' liability for torts is decided by the rules of English Law of Torts i e. infants are liable to be sued for torts of all kinds, and except when the action is founded upon malice or want of care, the tenderness of the infant's age is immaterial. This portion of the preliminary part of the code dealing with infants requires consolidation.

Before the passing of the Lunacy Act of 1912 the bulk of the law relating to the custody of lunatics and the

(1) *Puyi Kuth v. Kaurhirapokil* (1881) 3M. 248.

(2) *Bai Shirinbai v. Kharsedji* (1896) 22B 430, 436.

2 Lunatics.
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management of their estates in India was contained in the following Acts :—

Lunacy Act 1912.

- (1) The Lunacy (Supreme Courts) Act, 1858 (XXXIV of 1858).
- (2) The Lunacy (District courts), 1858. (XXXV of 1858).
- (3) The Indian Lunatic Asylums Act, 1858 (XXXVI of 1858)
- (4) The Military Lunatics Act, 1877 (XI of 1877)
- (5) The Indian Lunatic Asylums (Amendment) Act, 1886 (XVIII of 1886).
- (6) The Indian Lunatic Asylums (Amendment) Act, 1889 (XX of 1889).
- (7) Chapter XXXIV of the Code of Criminal Procedure, 1898.
- (8) Section 30 of the Prisoners Act, 1900

The first three of these Acts are based in great measure on the English Lunacy Regulation Act, 1853 (16 & 17 Vic , c. 70) and the English Lunatics Act, 1853 (16 & 17 Vic. c. 96) These English Acts after frequent amendment are now replaced by the Lunacy Act, 1890 (53 Vic c 5), as amended by the Lunacy Act, 1891 (54 & 55 Vic c 65). It was in the opinion of the Government of India desirable that the law relating to the custody of lunatics in India should be amended and assimilated with the modern English law on the subject and the Act of 1912 has effected that purpose. In drafting the Act of 1912 opportunity has also been taken to rearrange and consolidate as far as possible the whole law relating to lunatics. Our law on this subject before the passing of the Act of 1912 was not only confused and wide spread over several enactments, but was also completely out of date. The present Act only consolidates the different enactments on the subject and attempts to bring the law in certain important particulars into line with the modern English Act. No question of principle is involved in this Bill (1).

The Law relating to Lunacy has been codified by Act IV of 1912, but that Act says very little about the status of Lunatics. This Act together with 14 & 15 Vic. c. 81 §§1-5, 7, and 47 and 48 Vic. c 64. §10 (4) contains the law on the subject. But, for the restricted capacity of lunatics we shall have to turn to the Contract Act and the Penal Code. So far as Torts are concerned the rule of English

(1) See the *Gazette of India*, 23 Sepr. 1911, Pt V. p. 147, also Pt. VI. p. 655

law will apply in this country viz. "that lunatics are liable for torts to the same extent as sane persons, provided that the torts are committed by them while in that condition of mind which is essential to liability in sane persons" (1)

L.E.C. VI.

2 Lunatics.

Contract Act, §§ 6 (4) , 12, 201 (termination of agency)
254 (1) (Dissolution of Partnership by order of court)

Crimes—Penal Code §84.

This part should contain only Pt. II. of the Indian Companies Act dealing with the constitution and incorporation of Companies and Associations under this Act.

3 Companies.

There is no general law of corporations in this country. Each corporation is the creation of an Act and each corporation is a juridical person and governed by the rules of English law, unless there is any provision to the contrary in the Act itself.

4. Corporations.

This branch of law is the subject of Tagore Law Lectures for 1914.

Status of females according to the different systems of law in force in India should be dealt with in this Part, but substantive portion should be included under Substantive law (Private. Family relations).

5 Females.

This part should also contain the law relating to Interpretation of Statutes. This branch of law has been codified to a very small extent by the General Clauses Act of the Council of the Governor-General and of several Provincial Legislatures. But a large portion of this subject is only judge-made law and it is necessary that law on this subject should be codified. The General Clauses Acts merely touch the fringe of the subject. The following is a list of the General Clauses Acts in British India.

6 Interpretation of Statutes.

1. The General Clauses Act (X of 1897) consisting of 29 sections.
2. The Bengal General Clauses Act (Ben. Act I of 1899) consisting of 30 sections.
3. Bombay General Clauses Act (Bom. Act I of 1904) consisting of 30 sections.
4. Burma General Clauses Act (Bur. Act I of 1898) consisting of 28 sections.
5. Madras General Clauses Act (Mad. Act I of 1867) consisting of 5 sections.
Madras General Clauses Act (Mad. Act I of 1891) consisting of 22 sections.
Madras General Clauses Amendment Act (Mad. Act II of 1896) consisting of 1 section.

(1) Clerk and Lindsell on Torts, 4th Ed p. 48.

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General Clauses
Acts.

Madras Act I of 1867 does not apply to any Act passed after 1st January, 1892.

6. Punjab General Clauses Act. (Punj. Act I of 1898) consisting of 26 sections.

7. U. P. General Clauses Act (U. P. Act I of 1904) consisting of 29 sections.

“A measure resembling the General Clauses Act of 1868” says Sir H. Maine (1) “has long been contemplated in the Legislative Department of the Government of India, but has been delayed from various causes, among which has been the impression that a series of clauses, having the same object as that Act, might possibly be sent out by the Indian Law Commissioners. It is hoped that if this Bill becomes law, it will not only produce greater clearness and intelligibility in the Acts hereafter made by the Governor-General of India in Council, but will also contribute to the attainment of uniformity in our laws, and save expense by the exclusion of many provisions now necessarily inserted.” The first enactment of this kind was Lord Brougham’s Act (13 & 14 Vic. c. 21). The provisions of that statute were adapted to India and somewhat amplified by the General Clauses Act of 1868 (I of 1868); and the General Clauses Act of 1887 (I of 1887) was a further extension of the same principle. “It is obviously expedient” said the Hon’ble Sir M. D. Chalmers (2) “that the legislative dictionary, as it may be called, should be contained in a single enactment, and that the two Acts, above referred to should be consolidated, and it seems desirable to take the opportunity of making any additions that later experience may have suggested, and in particular to incorporate such provisions of the Interpretation Act, 1889 (52 & 53 Vic. c. 63), as are applicable to India. That Statute, like the Indian Act of 1887 was drafted by Sir C. Ilbert and is in effect a careful revise and extension of the latter. The proposed measure (3) will have this further advantage that it will tend to secure uniformity of language and construction in Indian and English legislation, in so far as both have to deal with the same subject-matter.” Besides this General Act there are six Provincial General Clauses Acts, which have been mentioned before. Now the question is, that when the object of all

(1) *Statement of Objects and Reasons, Gazette of India Aug. 24, 1867. p. 1210.*

(2) *Gazette of India February 6, 1897, Pt. V. p. 38.*

(3) Act X of 1897.

these Acts is to secure uniformity of language and construction in the Acts, is it necessary to have all these different Acts or is it not possible to have all these different Acts consolidated? If we examine the contents of these different Acts we find that § 3 Act X of 1897, the definition section, defines 59 terms. Section 3 of the Bengal Act (*Ben. Act I. of 1899*) defines 48 terms Bombay Act (*Bom. Act I. of 1904*) 51 terms. Burma Act (*Bur. Act I of 1898*) 65 terms. U. P. Act (*U P Act I of 1904*) 50 terms Madras Acts 38 terms and the Punjab Act (*I of 1898*) 60 terms

Of these terms about 48 of them e.g. (1) Abet, (2) Act, (3) Affidavit, (4) Barrister, (5) British India, (6) Chapter, (7) Commencement, (8) District Judge, (9) Document, (10) Father, (11) Financial Year, (12) Good Faith, (13) Government of India, (14) Immoveable Property, (15) Month, (16) Moveable Property, (17) Rule, (18) Schedule, (19) Scheduled District, (20) Sign, (21) Son, (22) Swear, (23) Will, (24) Writing, (25) Year &c. &c have been defined in identically the same way in all these different Acts.

There are 5 terms e.g. Collector, Local Authority, Enactment, &c. which require little change and may be defined in a way which will make the repetition of the definition in each of these Acts unnecessary

Then again, most of the sections of these different Acts are very much the same and require verbal alterations only before they can be put in one Code.

But these Acts do not exhaust the subject and the Tagore Law Lectures by Mr K. S. Bonnerjee together with the General Clauses Acts may be used as the groundwork of a Code on this subject.

Now we come to the Second Part of the Code which deals with Substantive Law. Substantive Law as we have seen before may be divided into two main heads viz. I. Public Law and II. Private Law. Public Law again is sub-divided into three sub-divisions viz. (a) Constitutional (including Judicial). (b) Regulative and (c) Criminal. The Indian Constitutional Law is contained in several Statutes—orders in Council and Acts of the Government of India and requires consolidation. "The case for consolidating the English Statutes relating to India" says Sir C. P. Ilbert (1) "is exceptionally strong. The Government of India is a subordinate Government, having powers derived from and limited by Acts of Parliament. At every turn it runs the risk of discovering that it has unwittingly transgressed one

B. Substantive Law.
Public Constitutional, (including judicial systems) (1) Government of India.

(1) *Government of India*. 2nd Ed. Preface.

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(1) Government
of India.

of the limits imposed on the exercise of its authority. The enactments on which its authority rests range over a period of more than 120 years. Some of these are expressed in language suitable to the time of Warren Hastings, but inapplicable to India of to-day, and unintelligible except by those who are conversant with the needs and circumstances of the times in which they were passed. In some cases they have been duplicated or triplicated by subsequent enactments, which reproduce with slight modifications, but without express repeal, the provisions of earlier statutes; and the combined effect of the series of enactments is only to be ascertained by a careful study and comparison of the several parts. A consolidating Act would repeal and supersede more than forty separate statutes relating to India."

Another reason why law on this subject should be codified is that some people think and teach that there is no such thing as British Indian Constitutional Law. They do not know and cannot see that the constitution is contained in forty different Statutes.

Importance of consolidation of this branch of Substantive Law was appreciated by the authorities and there was some correspondence between the Secretary of State for India and the Government of India on this subject. In 1873 the Secretary of State sent to the Government of India the rough draft of a Bill to consolidate this branch of law and in 1876 Government of India submitted to the India Office, an amended draft, embodying several proposals for alteration of the law; but nothing was done after that and the matter was allowed to drop. But though nothing has been done by the authorities, that eminent jurist Sir C. P. Ilbert has prepared a "Digest of Statutory enactments relating to the Government of India" which is to be found in his "*Government of India*". This Digest together with the following important Statutes, Orders in Council and Notifications passed and published subsequent to the publication of the Digest will be the ground work of a Code. The Statutes &c. to be added are.

(1) *The Council of India Act*, 1907 (7 Ed. VII. c. 35) providing that the number of members of the Council of India should not be less than 10 not more than 14.

(2) *The Indian Councils Act*, 1909 (9 Ed. VII c. 4). It amends the Indian Councils Acts, 1861, 1892, and the Government of India Act, 1833. It has made important changes in the constitution and functions of the Indian

Legislative Council, and has given power to the Governor-General in Council to make changes in the Executive governments of the different Provinces in India and to make Regulations. The Regulations framed under the provisions of this Statute embody the major portion of the law on the subject.

LEC. VI.

(1) Government of India.

Changes made by this Statute may be considered under the following heads.—

(a) Constitution.

(b) Functions.

(a) *Constitution*—It has been changed in the following respects—

(i) *Number*—It has been increased.

(ii) *Proportion of official and non-official members.*—
It has been changed in favour of non-official members

(iii) *Method of appointment.*—All the members are not to be nominated. Some of them should be nominated and some elected.

(b) *Functions*—

(i) *Legislative*—No change in the legislative functions of the Council has been made by this Statute. They are still regulated by the Statute of 1861

(ii) *Deliberative.*—Two important changes have been made on this point.

(iii) *Interrogatory.*—The right of members on this point has been extended

(III) *Government of India Act 1912* (2 and 3 Geo. V. c. 6.).

(IV) The Proclamations, Notifications, etc., containing the announcements made by His Imperial Majesty the King-Emperor on the 12th December 1911 at Delhi e.g. the Proclamations published under Notifications Nos. 288—391, dated 22nd March 1912, published in the *Gazette of India*, March 23, 1912 (1)

(1) Pt I pp 363—365 *Notification No 288* (Governor-General not to be the Governor of Bengal) It is a Declaration by the Secretary of State in Council of India under the powers reserved to him by the East India Company Act, 1853 (16 and 17 Vic. c. 95) and the Government of India Act 1858 (21 and 22 Vic. c. 105).

Notification No. 289 (creating the Province of Behar and Orissa) It is a Proclamation, to which the sanction of His Majesty the King Emperor of India has been signified by the Secretary of State for India in Council.

Notification No 290 (declaring what territories should be included within the Presidency of Bengal). It is a Declaration by the Gover-

L.K. VI.

(2) Judicial
system

High Courts.

Chief Courts.

Subordinate
Civil Courts

This Digest also deals with the constitution and powers of the Indian High Courts. To the Statutes mentioned in Pt IX of the Digest, Statute 1 and 2 Geo V c 18 (The Indian High Courts Act, 1911) should be added and the provisions of the Digest altered accordingly. This Statute amends 24 and 25 Vic c 104 §§2, 9, 13—15, 19. Besides the Indian High Courts there are chief Courts in the Punjab (XVIII of 1884) and Burma (VI of 1900). There are also subordinate Civil Courts in British India. The following are some of the important Civil Courts Act, which, if possible, should be consolidated —

(1) Bengal, Province of Agra and Assam —

Jimins—Assam, Bengal and Province of Agra, Act XII of 1856. *Civil Courts Act* (Assam, Bengal and Province of Agra) Act XII of 1887.

(2) Bombay —

Civil Courts Act, Bombay Presidency. Act XIV of 1869

(3) Madras —

Act III of 1873 (*Civil Courts Madras Presidency*) Act VII of 1892 (*City Civil Courts Act*)

(4) Oudh.—

Act XIII of 1879 (*Oudh Civil Courts*)

(5) Lower Burma.—

Act VI of 1900 (*Lower Burma Courts*)

Other enactments are: (1) Bombay Reg. IV of 1827 §26 (Law to be administered. Bombay Presidency). (2) Act XVI of 1838 (*Land Suits Bombay*) (3) XV of 1874 §§5-7 (*Laws Local Extent Act*). (4) Reg I of 1877 (*Ajmere Courts*). (5) XVII of 1879 §2A (*Dekkhān Agriculturists*) (6) XVIII of 1884 (*Punjab Courts Act*). (7) U.P. Act II of 1896 (*Honorary Munsiffs—United Provinces*) (8) Reg I of 1896 (*civil justice Upper Burma*). (9) Regulation IX of 1896 §§3-8, 71-72, 89, 93, 94 (*Civil Justice British Beluchistan*) (10) Reg I of 1901 (*Coorg Courts*). (11) Reg VII of 1901 (*Law and Justice N. W. Frontier Province*). (12) II of 1904 (*Central Provinces Courts*) (13) Beng Act IV of 1906 § 2 (*Civil Courts. Sambalpur*).

nor-General, in exercise of powers conferred by §47 of the Indian Councils Act, 1861, §4 Government of India Act, 1865.

Notification No 291 (Assam to be under a Chief Commissioner) It is a Proclamation by the Governor-General in Council under §37 of the Government of India Act, 1854

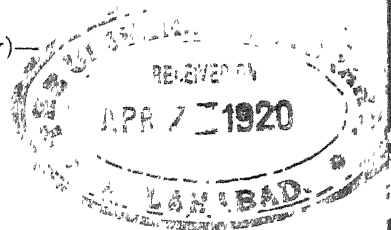
The important enactments on this subject (Army) Lec. VI.
are.—

- | | |
|---|----------------------------|
| (1) 44 and 45 c.58 (Army Act, 1881). | (3) Army. |
| (2) Act VIII of 1911 (The Indian Army Act) | |
| (3) Act XX of 1869 (The Indian Volunteers Act) as amended by Act X of 1896 and Act VI of 1909 | |
| (4) Act XV of 1910 (The Cantonments Act, 1910). | (4) Local self-government. |

Law on this subject is contained in different Acts relating to Municipalities and District Boards. Condition of things is so different in different parts of the country that it is very difficult to say whether codification is possible for some time to come. Municipalities and District Boards have been invested with limited power of taxation and administration. The following are the important Acts relating to Municipalities :—

Power of taxation
Municipalities.

- (1) AJMERE—
Reg. V of 1886 §§41-47.
- (2) ASSAM (except certain towns)—
Beng. Act V of 1876 §§7, 77-159
- (3) BENGAL (except Calcutta and Sambalpur District) and certain towns of Assam—
Beng. Act III of 1884 §§7, 85-156, 172, 280-297, 310-334A.
- (4) CALCUTTA—
Beng. Act III of 1899 §§ 147-233 ; 559 (2) , 574 ; 575.
- (5) BOMBAY PRESIDENCY (except Bombay City)—
Bombay Act III of 1901, §§14 (3), 46-89.
- (6) CITY OF BOMBAY—
Bombay Act III of 1888, §§139-219.
Bombay Act IV of 1902 §§45 (1) (b) ; 46.
- (7) BURMA—
Bur. Act III of 1898, §§46-70 ; 142 (m).
- (8) CENTRAL PROVINCES & SAMBALPUR—
Act XVI of 1903 §§35-48 ; §105 (m) ; 150 (a) (i).
- (9) COORG—
Reg. II of 1907 §§35-47, §99 (m), §144 (a) (i).
- (10) MADRAS PRESIDENCY (except city of Madras)—
Mad. Act IV of 1884, II of 1907 Schs. A B.C.
Mad. Act IV of 1884 §§48 ; 50-110, §269 A.
Schs. E.F.G.
Mad. Act II of 1907, §§6-10.
- (11) MADRAS CITY—
Mad. Act III of 1904, §§115, 116 ; §26 (1) (c) ;
§§117-190, 465 ; 409(5)



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(12) THE PUNJAB—

Act XX of 1891, §§42 Sch. 43-70 ; §143 (f) (g)
(h) (s) ; §143 (3) §§208, 209.

(13) UNITED PROVINCES—

U. P. Act I of 1900 §§59-70, §187 (1) (k)
U. P. Act II of 1899

As I have stated before that the condition of things is so different in different parts of the country that it is very difficult to say whether codification is possible for the present.

Substantive
(b) Regulative
(1) Education.

Now we shall deal with the second branch of substantive public law i. e. Regulative branch. This is divided into several sub-divisions and we shall first take up the subject of education. The earliest reference to provision of public education is to be found in 53 Geo. III c 155 §§42, 43 (control of India Board over colleges and seminaries in India. Provision to be made for public education) The provision of these two sections have been omitted by Sir C. P. Ilbert in his Digest as having been made unnecessary by alteration of circumstances.

Indian
Universities
Act VIII of 1904.

Act VIII of 1904 (The Indian Universities Act) has amended the law relating to the Universities of British India. In giving the history of the proposal to deal with the five Indian Universities in one Act, Sir T. Raleigh said "The advice we received pointed in the direction of a repeal of the five Acts of incorporation and the substitution of five new Acts for them. When I came to discuss the matter with my Hon'ble colleague Dr Gurudas Banerjee, it seemed to us undesirable to break so suddenly and so completely with the past. We set ourselves to discover whether it would not be possible to keep the original Acts of Incorporation with such tradition and sentiment as had gathered round them, and to provide for the constitutional changes that appeared to us to be required by means of a general amending Bill."

I have referred to this point in detail because the procedure adopted in this case may have to be adopted in other cases where consolidation of different Acts may not be feasible e. g. the General Clauses Acts ; the Civil Courts Acts &c. This Act deals with the Universities, but provisions for secondary and primary education will be found in the Local Self-Government Acts and Municipal Acts e. g. In Ajmere, Reg. VI of 1886 §§4, 12, 13, 23.

BENGAL.—Bengal Act III of 1885 (as amended by Beng. Act V of 1908) Pt. III Ch. I B. §§62-65 B.

§138 (j) & (q) and the Notification No. 3373 LEC VI.
dated 25th September, 1895.

BOMBAY—Bom. Act I of 1884 §30.

(1) Regulative
(1) Education.

CENTRAL PROVINCES & SAMBALPUR—Act I of 1883
§§9, 10.

MADRAS—Mad Act V of 1884. §95 (iv) §141 (c)

THE PUNJAB—Act XX of 1883 §21

THE UNITED PROVINCES—U. P Act III of 1906 §42.

Besides these sections the rules framed by the Local Governments should be published in this part

The Municipal Acts also contain provisions for establishment and maintenance of schools.

AJMERE—

Reg. V of 1886 §§69(2) (c)

ASSAM (except certain towns)—

Beng Act V of 1876 §61(5)

BENGAL—

Beng Act III of 1884 §69 (IV), (V).

CALCUTTA—

Beng Act III of 1899 §14 (2) (vii)

BOMBAY (except city of Bombay)—

Act III of 1901 §54 (p) ; 56 (c);

BOMBAY CITY—

Act III of 1888 §§7, 39, 41, 61(q), 461(u)

BURMA—

Bur. Act III of 1898 §§72(1) (c), (2) (d-f) and 73.

THE CENTRAL PROVINCES—

Act XVI of 1903 §50 (1) (c) (2) (c-e)

COORG—

Reg. II of 1907 §49 (1) (c) ; 2(c) (d) (e) (almost the same as §§72 (1) (c) ; (2) (d-f) of Bur. Act III of 1898 and §50 (1) (c) , (2) (c-e) of XVI of 1903).

MADRAS (except city of Madras)—

Mad. Act IV of 1884 (as amended by Mad. Act III of 1897) §§113 (IV) ; 117-124 ; §250 (c) ; §253.

MADRAS CITY—

Mad. Act III of 1904 §§87-89. Sch. IV.

THE PUNJAB—

Act XX of 1891 §72 (2) (c-c).

THE UNITED PROVINCES—

U. P. Act I of 1900 §53 (2) (c-e).

Police. The Police Act, 1861 (V of 1861).

It is an Act for the Regulation of Police and was placed

L^{EC}. VI.

Substantive Law

Public.

Regulative.

(2) Police.

on the Statute book because it was found "expedient to re-organize the Police and make it a more efficient instrument for the prevention and detection of crime" It has been amended by Act III of 1888 Some of the sections of Act V of 1861 deal with criminal law (§§30, 30A, 34) and should be placed under the heading "Criminal Law". There are also different Police Acts for the Presidency Towns though there is a great family resemblance between them. The present Calcutta Police Act is based on Bombay Police Act

(3) Public health.

This branch of law is contained in the Local Self-Government Acts and Municipal Acts and the Rules and Notifications issued under those Acts. The provisions of these different Acts relating to this subject may be put together with necessary alterations and may be consolidated if necessary

(4) Government of particular profession.

The most important branch of this subject is that which deals with Legal Practitioners. There is no enactment of the Indian Legislature applicable to the medical practitioners in India (1). The different Press Acts govern the editors &c. of newspaper in this country.

Legal practitioners.

1. *Legal Practitioners Acts.*

The principal Acts are—

- (a) The Legal Practitioners Act, 1879 (XVIII of 1879) as amended by Act IX of 1884 and I of 1908.
- (b) Bom Reg. II, 1827, §§47-54, 56.
- (c) Act I of 1846 (Pleaders etc. Bombay and Madras Presidency.)
- (d) Act XX of 1853 (Pleaders etc.)
- (e) Bom Act XII of 1866 §§16, 17 (Sindh, Courts).
- (f) Beng. Act II of 1869 §21 (Tenures. Chota Nagpur)
- (g) Act XV of 1874 §§4, 5 (Laws Local Extent).
- (h) Reg. I of 1877 §27 (Courts, Ajmere).
- (i) Reg. II of 1877 §118 (Revenue Agents, Ajmere)
- (j) Act XVII of 1879 (Dekkhan Agriculturists)
- (k) Reg. I of 1894 §3 (Laws. Angul).
- (l) Reg. I of 1896 §§25-29, 38 (Civil Courts. Upper Burma).
- (m) Reg. IX of 1896 §90(d) Civil Justice. British Beluchistan).
- (n) Act V of 1898 §557. (Criminal Procedure).

(1) In England the medical practitioners are governed by 49 & 50 Vic. c.48 and 5 Ed VII c 14. There is a Bill before the Bengal Legislative Council on this subject.

- (o) Act VI of 1900 §40 (Courts Lower Burma). LFC VI.
 (p) Reg I of 1900 §18 (2) (b) (Chittagong Hill tracts).
 (q) Reg. VII of 1901 §§5, 9, (Law N. W. Fr.).
 (r) U. P Act II of 1903, §21 (Land Alienation).
 (s) Act V of 1908, §119 (Civil Procedure)
 (t) Act XIV of 1908, §4 (Criminal Law Amendment Act).

The provisions of all these Acts may be consolidated or may be affected by an Amending Act on the same line as the Indian Universities Act (Act VIII of 1904)

2 Printing Presses and Newspapers.

There are only three Acts on this subject ; Act XXV of 1867 ; I of 1910 and the Newspapers (Incitements to offences) Act, 1908 (VII of 1908). These Acts can be consolidated and should be published together Now we come to the last sub-division of Regulative, Public Substantive Law It should contain all the enactments dealing with the substantive public law (regulative) but which cannot be included in any of the classes mentioned above These answer to some extent the current miscellaneous legislation of Sir James Stephen —(1) *Excise (a) Cotton goods Acts VIII of 1878 ; VIII of 1894 ; II of 1896. (b) Spirituous and fermented liquor and intoxicating drugs (except opium).* (1) Excise. (15) Miscellaneous.

- (1) *Act XVI of 1863 The Excise (Spirits) Act, 1863.* This Act has been repealed in Bengal by Bengal Act V of 1909 and in the United Provinces by U. P Act IV of 1910.
- (2) Act VIII of 1878. (Sea Customs Act) §§144-154.
- (3) Act XIII of 1890 (The Excise Malt Liquors Act, 1890)
- (4) Act XII of 1896. The Excise Act In force in Northern India, Burma and Coorg, amended by Act VII of 1906.
- (5) Bom. Act V. of 1878.
- (6) Mad Act I of 1886
- (7) Bur. Act III of 1904.
- (8) Ben. Act V of 1909.
- (9) U P. Act IV of 1910.

(11) *Coinage and Paper Currency*

(11) Coinage and Paper Currency.

The Indian Coinage Act III of 1906 consolidates and amends the law relating to Coinage and Mint in this country While Act II of 1910 consolidates and amends the law relating to the Government Paper Currency. Section 21 of Act III of 1906 and section 29 of Act II of 1910 authorize the

LÆC. VI.

Substantive
Public.
Regulative
Miscellaneous
(iii) Government
and welfare of
the people
(a) Factories Act

Governor-General in Council to make rules to carry out the purposes and objects of these Acts. Thus the Rules framed under these Acts together with these Acts contain the law on this subject in this country.

(iii) *Government and welfare of the people*

(a) Factories Act. Attention had first been drawn to the question of factory labour in India by certain remarks made in a report on the administration of the Cotton Department in Bombay. It was said in that Report that the poorer classes derived great benefit from the mills, but that the advantage carried with it a corresponding and serious disadvantage. The hours of labour, it was observed, were not limited by any Government Regulation, the working day was long; the nature of the work fatiguing, whilst women and children were largely employed, and generally, without any periodically recurring day for rest like Sunday. It was pointed out that the physical wear and tear of the employed must therefore be considerable and that it was useless to expect that greater consideration would be shown to the female and juvenile hands by the mill-owners in this country than had been exhibited by and towards the same classes in England. These remarks had led to a correspondence the result of which had been the appointment of a Commission by the Bombay Government with instructions to investigate and report upon the subject. It appeared from the Report made to the Government of Bombay by that commission that the witnesses whom it examined were divided as to the necessity of legislation; but, on the whole, they might be considered to have given their evidence in favour of a simple and plain enactment dealing fairly with the subject and not entering into too much detail. The members of the commission themselves were not unanimous in their recommendations; but the official members and medical officers advised the enactment of a simple law regulating the hours of employment of children and requiring that machinery should be properly fenced. They were further of opinion that the Act should be passed by the Government of India and should be applied to the whole of British India.

Upon receipt of the report of this Commission further enquiry had been made from all Local Governments in order to ascertain whether the precautions which had been recommended for Bombay were necessary elsewhere. The result of the inquiry went to show that the factory people were, as a body, in many respects quite as well, if not better, off

than most persons of the same position in life who were not employed in factories. It was clear, however, that as regarded the employment of children and the protection of machinery, there was room for abuses; that these in some places already existed, and that there was good reason to apprehend their increase with increased competition. A good case, therefore, was shown to exist for the enactment of a regulating measure. The most convenient form of such a measure seemed to be that of a single uniform law, not extending to the whole of India, but applicable to any part of it, when needed. No good object would be gained by extending it at once to the whole of the country. Many provinces had no factories at all within the meaning of the Act, and nothing but trouble would be caused by encumbering the Statute-books with an unnecessary Act. The ends in view could be sufficiently attained if the Bill were framed as a permissive measure, which could be put in force by Local Governments when occasion arose. As regarded the scope of the Bill, its provisions were limited strictly to those points for which legislation had been shown to be necessary. It was most important that nothing should be done which could check the development of manufacturing industries in India. From every point of view it was desirable that this field for capital and labour should be developed and extended to the utmost, and especially because it helped to relieve the pressure of the agricultural population upon the land. The great body of the people of India had no employment but that of agriculture; and the result was that in many parts it was becoming daily more difficult for all of them to obtain a livelihood from the soil. The obvious dangers of this overcrowding had been brought into special notice during the famines that had so often afflicted such large parts of India. The Bill, therefore, was carefully framed, so as to offer no obstacle to the free growth of manufacturing industries. It contemplated no interference with the due freedom of employers and employed. It was not proposed to introduce into the Bill any of the other points for which legislation had been found necessary in England. The differences between England and India of climate, character and habits of life of the people were so great that much which was needed there would not only be inapplicable but perhaps actually injurious here. The Bill also contained certain provisions enabling Local Governments to arrange for the inspection of factories and to compel the owners or managers of fac-

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tories to report accidents when they occurred. Without these powers, the two principal objects of the Act could not be attained. This Act was passed in 1881 (XV of 1881) and amended by Act XI of 1891. To examine how these two Acts had been working a Factory Labour Commission was appointed. The Report submitted by this Commission in 1908 disclosed the existence of abuses in factories, particularly in connection with the employment of children and the length of the hours for which the operatives generally were employed. The Commission made proposals with the object of checking these abuses, and also submitted proposals for strengthening the law on several points so that inspection might be more effective and the administration of the law improved. To give effect to these recommendations in so far as they had been approved by the Government of India, legislation was undertaken and the present Act (XII of 1911) was passed repealing the old factories Acts (XV of 1881 and XI of 1891).

(b) Co-operative
Credit Societies

(b) Another Act of this class is the *Co-operative Credit Societies Act*. The first Co-operative Credit Societies Act was passed in 1904 (X of 1904).

It was passed with the object of encouraging thrift, self-help and co-operation among agriculturists, artisans and persons of limited means ; and for that purpose it was necessary to provide for the constitution and control of Co-operative Credit Societies and to attain that end, Act X of 1904 was passed. When the Act of 1904 was in force it was found that there were certain difficulties, which, unless removed, will not help the formation of such Societies. To remove these difficulties and to facilitate the formation of Co-operative Societies for the promotion of thrift and self-help among the people mentioned above the present Act (II of 1912) has been passed. This Act and the Rules framed under §43 of this Act contain the law on the subject of Co-operative Societies in this country.

Government
Savings Bank.

(c) Another institution of this kind is the Government Savings Bank. Government Savings Banks are governed by the *Government Savings Bank Act* (V of 1873) and the Military Savings Banks by 44 and 45 Vic c 58, §44 (11).

Presidency Banks
Act.

(d) Presidency Banks Act (XI of 1876 ; V of 1879, XX of 1899 ; I of 1907.)

Indian Securities
Act.

(e) *The Indian Securities Act*, 1886 (XIII of 1886) consolidates and amends the law relating to Government Securities. This Act together with the Rules framed under

the Act contains the law of Government Securities in this country L.R.C. VI.

(iv) *Income Tax Act* (II of 1886) amended by Act XI of 1903. The Co-operative Societies Act, 1912 (Act II of 1912 §28) empowers the Governor-General to grant exemption from Income Tax in certain cases. Income Tax Act.

(v) *Public Buildings*. Museums.—Laws Consolidated and amended by Act X of 1910.

(vi) *The Ancient Monuments Preservation Act*, 1904 (VII of 1904).

(vii) *Merchant Shipping*. Besides the main Act (I of 1859) the following Statutes and Acts contain the law on the subject.

(A) STATUTES.—

- (1) 4 G. IV. c. 80 §§25, 26, 28, 31, 32. Lascars (1823).
- (2) 6G. IV. c.78 §9. Hoisting flag in case of plague (1825).
- (3) 12 & 13 Vic. c. 25. Desertion (1849).
- (4) 13 & 14 Vic. c. 26. Salvage (1850).
- (5) 16 & 17 Vic. c.107 §229. Coasting trade (1853).
- (6) 24 & 25 Vic. c. 97 §§42, 43, 56. Malicious injury (1861).
- (7) 27 & 28 Vic. c.25 §§40, 41, 46. Convoy Salvage (1864).
- (8) 29 & 30 Vic. c.109 §31. Convoy (1866).
- (9) 39 & 40 Vic. c. 20 §2. Portuguese Deserters (1876).
- (10) 44 & 45 Vic. c. 69 §27. Fugitive Offenders. (1881).
- (11) 53 & 54 Vic. c.37 §5 Sch. I Foreign Jurisdiction (1890).
- (12) 54 & 55 Vic. c. 50 §1. Affidavits (1891).
- (13) 57 & 58 Vic. c. 60. Consolidation (1894).
- (14) 59 & 60 Vic. c. 12. Reports of Floating Derelicts (1896).
- (15) 60 & 61 Vic. c. 59. Under-manning (1897).
- (16) 61 & 62 Vic. c. 14. Shipowners' Liability (1898).
- (17) 61 & 62 Vic. c. 44. Fees, Light-dues (1898).
- (18) 63 & 64 Vic. c. 32. Liability of Shipowners (1900).
- (19) 5 Ed. VII c. 10. Liability of Shipowners (1905).
- (20) 6 Ed. VII c. 48. Merchant Shipping Amendment (1906).

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(21) 6 Ed. VII. c. 58 §§ 7, 11, 13 Workmen's Com-
pensation (1906).

(22) 7 Ed. VII c. 52. Tonnage and Measurement
(1907)

(B) INDIAN ENACTMENTS —

(1) Act XIX of 1838. Coasting and Fishing Vessels.
Bombay Presidency.

(2) Act X of 1841 Registration ; Passes for Ships
of Native States.

(3) Act V of 1850 Coasting trade.

(4) Act XI of 1850 Registration. Passes for Ships
of Native States.

(5) Act I of 1859. Merchant Seamen.

(6) Act XII of 1859. Trial of Pilots, Calcutta.

(7) Bom. Act II of 1864 §15. Life-saving appli-
ances.

(8) Beng. Act. IV §42. Deserters, Calcutta.

(9) Act XV of 1874 §§3,5. Laws Local Extent.

(10) Act XIII of 1876 Merchant Seamen.

(11) Act IX of 1879 Burma Coast Lights.

(12) Bom. Act VI of 1876 §72. Pilots, Bombay
Ports

(13) Act VII of 1880. Safety, Ship Surveyors, etc.

(14) Act V of 1883. Casualties and Distressed
Seamen.

(15) Act XII of 1883 Pilots, Lower Burma.

(16) Act VII of 1884 Steam Ships

(17) Act XII of 1885 Passengers.

(18) Bom. Act VI of 1886 §55. Pilots, Karaclii

(19) Act X of 1887 Native Passengers Ships.

(20) Beng Act IV of 1887 §18. Pilots, Chitta-
gong.

(21) Bom. Act II of 1887 §§10—16. Mahomedan
Pilgrims to Hedjaz.

(22) Bombay Act V of 1888. Pilots, Aden

(23) Mad. Act III of 1888 §20. Deserters, Madras
City.

(24) Act VI of 1891. Amendments.

(25) Act XV of 1894 Validation of Bombay Certi-
ficates to Engineers.

(26) Act XIV of 1895. Pilgrims.

(27) Ben Act I of 1896 §§10—17. Mahomedan Pil-
grims to Hedjaz.

(28) Act VI of 1898 §§40—42. Post Office.

(29) Act IX of 1904. Madras Coast lights.

(30) Mad. Act II of 1905 §§ 91—94. Pilots, Madras L_{EC} VI. Port

(31) Act XV of 1908 §§ 31, 35, 51-53 Pilots. Hoisting signals in rivers.

(32) Bur Act V of 1908. Pilots. Amendment.

(33) Act XVIII of 1908 The Indian Merchant Shipping Amendment Act.

(viii) *Railways*—Law on this subject is mostly contained in the following enactments.— (viii) Indian Railways

(a) 31 & 32 Vic c 26 (1868) } The Indian Railways Companies

(b) 36 & 37 Vic. c 43 (1873). } Act.

(c) 57 & 58 Vic c. 12 (1894) The Indian Railways Act

(d) Act IX of 1890. The Indian Railways Act.

(e) ,, X of 1895. Do. Do.

All these enactments may be published together and the English Statutes and Indian Acts may be consolidated by an Indian Act like the Presidency Towns Insolvency Act, 1909 (III of 1909).

(ix) *Post Office*.

Law on this subject is contained in the following:—

(a) Post Office Act VI of 1898 as amended by Act II of 1903 and Act III of 1912 and the Rules made under the Post Office Act and published in the Indian Postal Guide (ix) Post and Telegraph.

(b) XIII of 1898 §4 (Burma Laws).

(c) III of 1909 §35 (Insolvency Presidency Towns).

(d) I of 1910 §§14, 15 (Press)

(e) Reg I of 1900 (Chittagong Hill Tracts)

Telegraph

(a) Indian Telegraph Act, 1885 (XIII of 1885) and the Rules made under this Act.

(b) Code of Criminal Procedure §95 (Production of telegrams by the telegraph authorities in criminal proceedings).

(c) Indian Electricity Act (IX of 1910) §32 (Protection of lines from injury by use of electricity).

(x) *The Indian Marine Act*, 1887. It is an Act for the better administration of Her Majesty's Indian Marine Service. It has a long preamble and is one of very few cases where the Secretary of State for India in Council has given his previous approval to the passing of the Act. (x) Indian Marine

(xi) *Prison*.—Act IX of 1894 amends the law relating to prisons in this country and provides rules for the regula-

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tion of such prisons Under §59 of this Act the Governor-General and Local authorities, in certain circumstances can frame Rules, consistent with this Act Those Rules together with this Act contain the law on the subject in this country. §52 of this Act has been amended by Act XIII of 1910.

(xii) Salt.

(xii) Salt.—The law of this subject is to be found in the Indian Salt Act (XII of 1882) and the several Local Acts and Regulations and the Rules framed under the Acts Act XII of 1882 has been amended by Act XIX of 1890 Other enactments are :—

- (1) Mad Reg II of 1803 §§2, 32 (Collectors, Madras)
- (2) Beng. Act VII of 1864. Salt (§9 of this Act has been repealed by Act XII of 1882).
- (3) Reg III of 1872 §3 (Laws, Santhal Parganas).
- (4) Beng Act I of 1873 (Jurisdiction).
- (5) Act II of 1876 §§39, 43—53, 58 (Land and Revenue, Lower Burma)
- (6) Act VIII of 1878 §§20, 50 (Sea Customs).
- (7) Act XVI of 1879 (Transport of Salt, Bombay and Madras Coasts)
- (8) Mad Act IV of 1889 (Salt, Madras Presidency)
- (9) Reg III of 1889 §§33, 37—46, 53 (Land and Revenue, Upper Burma)
- (10) Reg I of 1890 §3 (Laws, British Beluchistan).
- (11) Bombay Act II of 1890 (Salt, Bombay Presidency)
- (12) Act VIII of 1894 §§2, 2, 5, 7 (Tariff).
- (13) Act XIII §4 (Laws, Burma).
- (14) Act X of 1908 (Duty).

(xiii) Official
Secrets.

(xiii) *Official Secrets* —The Indian Official Secrets Act, 1889 (XV of 1889) re-enacts for India, *mutatis mutandis*, the provisions of 52 and 53 Vic. c.52 (the Official Secrets Act, 1889). That Statute applies (§6) to all acts made offences by it when committed in any part of His Majesty's dominions, or when committed by British officers or subjects elsewhere, but the working in India of Criminal law enacted by Parliament has been found to be beset with practical difficulty ; and it had been thought desirable to re-enact that Statute (52 and 53 Vic. c. 52) for India with such adaptations of its language and penalties as the nomenclature of the Indian Statute book requires (1). It was passed with the object of preventing the disclosure, by unauthorized persons, of

(1) See *Gazette of India* Oct. 12, 1889, Pt. V p. 206.

official documents and information This Act has been amended by Act V of 1904. LEC. VI.

(xiv) *Indian Tariff Act*, 1894 (Act VIII of 1894) amended by Act III of 1896 ; XIV of 1899 , IX of 1903 §§2—7 ; VIII of 1910 , VI of 1911 (xiv) Tariff

(xv) *Electricity Act* Prior to the passing of the Indian Electricity Act of 1903, the only general Act relating to electricity in the Indian Statute Book was the Electricity Act, 1887 (XIII of 1887), and practically all that that enactment did was to empower the Governor-General in Council to make rules for the protection of person and property and for the prevention of injury to telegraph lines, appliances or apparatus used in the generation or supply of electrical energy. In the preamble to that Act it is expressly stated that, "in the circumstances of the supply and use of electricity in India existing at the time when it was passed, the exercise of control by means of licenses or other like methods might be deferred, and consequently no provision was made for the issue of licenses to companies, for the powers with which companies undertaking the supply of electricity to the public must be invested, or for the control which should be reserved to the Government over undertakings which would be virtual monopolies. In 1887, therefore, legislation on these points was considered premature." In 1891 the Government of Bengal, on receipt of proposals made on behalf of the Indian Electricity Supply Syndicate for the establishment of works for the supply of electric lights to the town of Calcutta, represented to the Government of India that, as the Act of 1887 made no provision for the issue of licenses or for many other matters which were essential for the protection of undertakers from unnecessary interference or restraint and of the public from excessive charges and undue preferences, further legislation appeared to be called for, either by a general Act applicable to the whole of India or by a local and special Act for Calcutta. The latter alternative was recommended as likely to involve less delay and a Bill was introduced and passed in the Bengal Legislative Council as the Calcutta Electric Lighting Act, 1895 (Bengal Act IX of 1895). Section 34 of the Bengal Act authorized the Local Government, by notification to extend its provisions to any municipality in the province, but little use had been made of that power (xv) Indian Electricity Act (ix of 1910)

In Madras there is an Electrical Tramway Company, but it was thought necessary to pass a special Act with regard to it, the requisite power for breaking up streets, etc ,

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which was one of principal objects of the Calcutta Electric Lighting Act, 1895, being secured to the Company by article 19 of an order which was passed with reference to it under the Indian Tramways Act 1886 (XI of 1886), and provides that "if electric power be used, communication by the existing Government telephone and telegraph lines shall be safeguarded as provided by the rules made by the Governor-General in Council in exercise of the powers conferred by the Electricity Act XIII of 1887."

The expediency of amending the Act of 1887 so as to provide for the control of undertaking by means of licenses for the supply of electricity for lighting, traction, transmission of power and other purposes was again considered by the Government of India in 1896. It was then considered *improbable that large electrical undertakings for which control by license was necessary, would be proposed for some time to come in any of the minor administrations*, and, as the more important Local Governments had Legislative Councils, it was apprehended that there would be but little difficulty in passing local Acts on the lines of the Calcutta Act of 1895, wherever this might be found to be expedient.

Circumstances however, rendered it advisable to reconsider this decision. In 1900 the Government of Bengal suggested to the Government of India that it would be advisable to frame an Act which would, amongst other things, put the procedure for dealing with questions of the supply of electrical energy upon a basis similar to that adopted in England, so far as this might be desirable, and that such an Act might with advantage be made applicable to the whole of British India.

Even before the receipt of this representation the Government of India had again begun to consider the expediency of Imperial legislation on the subject, it having been represented that in other parts of India the promoters of electrical enterprise would welcome the passing of a general Act. The various Local Governments were, therefore, consulted on the question, and at the same time a draft Bill which had been submitted some time before to the Government of India, by a member of a well-known English firm interested in the matter, was forwarded for criticism. The replies received were generally in favour of legislation by an Imperial Act and then the Act III of 1903 was passed (1). When this Act of 1903 was passed it was clearly recognized to be a somewhat tentative measure, and it was

(1) *The Gazette of India*. February 15, 1902. Pt. V p. 56.

anticipated that amending legislation would be called for at an early date. Having regard to the experience gained in the practical working of the Act, the Government of India in 1907 came to the conclusion that time had arrived for undertaking this amending legislation, and they referred various difficulties which had arisen in its working to a committee on which electro-technical and commercial interests were represented and ultimately the present Indian Electricity Act (IX of 1910) was passed. In its preamble the reference to "lighting and other purposes" has been omitted as lighting is no longer the chief application of electricity (1).

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(b) Regulative

The gradual improvement which is taking place in the construction of airship has given rise to certain new military problems. It has been considered necessary, on military grounds, to prevent the acquisition, through the use of such vehicles, of improper information as to the internal arrangements of forts, arsenals, magazines, etc., and also to protect places and persons from attack from such vehicles in times of actual hostilities. It has been found necessary to empower the Government to control, for military purposes, the manufacture, sale, import, export, use and possession of all airships by a system of licenses to be issued to approved persons, and also to take over all such airships, subject to the payment of reasonable compensation, in times of grave public emergency. The Indian Air-ships Act (XVII of 1911) was passed with these objects in view (2).

(xvi) The Indian Air-ships Act. (xvii of 1911)

At the date of the grant of the *Dewanny* to the East India Company in 1765, when the civil government of the Provinces of Bengal, Behar and Orissa was vested in the East India Company, the Mahomedan law was the criminal law of the country. That law was not abrogated then by the British Government, and for some years afterwards the administration of justice in criminal cases was left to the Nazim. But soon afterwards the question arose whether the East India Company could alter the Criminal law then in force, and Warren Hastings in one of his minutes maintained that the Company could and should alter it when necessary (3). Even when the Criminal law was administered by the Courts of the E. I. Company without reference to the Nazim, the Mahomedan law as modified by the Regulations and Acts of Government continued to be

Substantive. I Public.

(c) Criminal

(1) *The Gazette of India*. July 31, 1909. Pt. V. pp. 87, 88.

(2) *Statement of Objects and Reasons. Gazette of India*. Aug. 26, 1911 Pt. V p. 116.

(3) See Lecture VIII *Criminal Law*.

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the general criminal law of the country. It was expressly enacted by §74 of Regulation IX of 1793 that the sentences of the Nizamut Adawlut should be regulated by the Mahomedan law, except in cases in which a deviation from it was expressly directed by any Regulation passed by the Governor-General in Council.

In some cases provision was made with reference to the *fulwas* to be given by the Law Officers in cases in which the evidence given on a trial would be deemed incompetent by the Mahomedan law. (§56 Reg. IX of 1793)

Reg I of 1810 authorized the Government to dispense with the attendance and *fulwa* of the Law Officers whenever there might appear to be sufficient cause

Other modifications of the Mahomedan Criminal law were made, and in some instances particular offences, such as perjury and forgery etc were defined, and the punishment for them declared by Regulations of Government (1)

In 1832 it was enacted that any person not professing the Mahomedan faith when brought to trial on commitment for an offence cognizable under the general Regulations, might claim to be exempted from trial under the provisions of the Mahomedan Criminal Code (2) and in such cases the prisoner was tried with the assistance of a *Panchail*, assessors or a jury, and the *fulwa* of the Law Officers was dispensed with. After the passing of the Penal Code and the Code of Criminal Procedure, Regulation IX of 1793, by which the Mahomedan law, as modified by the Regulations, was established as the General Criminal law of the country and many other regulations bearing upon the same subject, were repealed by Act XVII of 1862 (3)

Indian Penal Code.

The system of penal law, which the First Indian Law Commission proposed and which ultimately became the Indian Penal Code, was not a digest of any existing system. The Law Commissioners did not find any existing system of penal laws which could furnish them even with a groundwork. They did not find in India any system of criminal law which the people regarded with partiality. They found that all the systems of penal law established in British India were of foreign origin. All were introduced by conquerors differing in race, manners, language and religion from the great mass of the people. "The Criminal law of

(1) Reg. II of 1807 ; Reg. XVII of 1817.

(2) Reg. VI of 1832, §5.

(3) *Queen v. Khyroolla*. (1866) B. L. R. Sup. Vol. Ap. 11, 13, 16. per Peacock. C. J.

the Hindus was long ago superseded, through the greater part of the territories now subject to the Company, by that of the Mahomedans, and is certainly the last system of criminal law which an enlightened and humane Government would be disposed to revive. The Mahomedan Criminal Law has in its turn been superseded, to a great extent, by the British Regulations. Indeed, in the territories subject to the Presidency of Bombay, the criminal law of the Mahomedans, as well as that of the Hindus, has been altogether discarded, except in one particular class of cases; and even in such cases, it is not imperative on the judge to pay any attention to it. The British Regulations, having been made by three different legislatures, contain very different provisions" (1). We have referred to the state of law in British India in the early part of the last century in the second lecture. Without repeating what has been said there I shall simply state here that widely did the systems of penal law, established in British India before the passing of the Penal Code, differ from each other and Lord Macaulay and his colleagues could not recommend any one of those different systems as furnishing even the rudiments of a good Code. The penal law of Bengal and of the Madras Presidency was, in fact, Mahomedan law, which had gradually been distorted to such an extent as to deprive it of all title to the religious veneration of Mahomedans, yet which retained enough of its original peculiarities to perplex and encumber the administration of justice. The technical terms and nice distinctions borrowed from the Mahomedan law were retained.

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Indian Penal Code.

The penal law of the Bombay Presidency was contained in the Regulations. Regulation XIV of 1827 contained almost the whole of it. Bombay Government was fully sensible of the great advantage which must arise from placing the whole law in a written form before those who are to administer and those who are to obey it (i.e. from Codification); and whatever may be the imperfections of the execution, high praise is due to the design. But the Commissioners could not take the Bombay Regulation as the groundwork of a penal code for all India, because it had no superiority over the penal law of other Presidencies, except that of being digested.

Such was the state of the penal law in Muffasil in 1837. In the meantime the population which lived within the local jurisdiction of the Courts established by the Royal Charters

(1) Letter from Lord Macaulay to Lord Auckland Dt 14th, Oct, 1837.

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was subject to the English Criminal law i e a foreign system framed without the smallest reference to India

Indian Penal Code

Under these circumstances the Commissioners did not think it desirable to take as the groundwork of the Penal Code any of the systems of law then in force in any part of India. They compared the Code they drafted with all those systems and had taken suggestion from all of them ; but they did not adopt a single provision merely because it formed a part of any of those systems. They also compared their work with the most celebrated systems of the Western Jurisprudence. They derived much valuable assistance from the French Penal Code, from the decisions of the French Courts of Justice and also from Livingston's Code of Louisiana. But after all, the basis of the Indian Penal Code is the Criminal law of England, "stript of technicality and local peculiarities," but suggestions were derived from French Code Penal and Livingston's Code of Louisiana. In submitting the Draft Penal Code Lord Macaulay and his colleagues said "The course which we recommend to the Government, and which some persons may perhaps consider as too daring, has already been tried at Bombay, and has not produced any of those effects which timid minds are disposed to anticipate even from the most reasonable and useful innovations. Throughout a large territory, inhabited to a great extent by a newly conquered population, all the ancient systems of Penal law were at once superseded by a Code, and this without the smallest sign of discontent among the people." Before becoming law in 1860, Macaulay's Draft was revised by Sir Barnes Peacock. The Draft Indian Penal Code when circulated for opinion evoked a good deal of opposition and many eminent Judges and Advocates General were against the passing of such an Act. But in spite of the forebodings of those people the Indian Penal Code has stood the test of time. "Besides repressing the crimes common to all countries" says Stokes (1) "it has abated, if not extirpated, the crimes peculiar to India, such as, *thuggee*, dedicating girls to a life of temple-harlotery, human sacrifices, exposing infants, burning widows, burying lepers alive, gang-robbery, sitting *dharna*." "The saying in Eastern Bengal is" says Sir C. P. Ilbert (2) "that every little herd-boy carries a red umbrella under one arm and a copy of the Penal Code under the other." This Code has been translated

(1) *The Anglo-Indian Codes*. Vol. I. p. 71.

(2) *Speech of Sir C. P. Ilbert at the celebration of the Centenary of the French Civil Code*.

ed into almost all the written languages of India and thus its provisions have been made known even to *Purdanashin* ladies, and those of them who have to manage *Zamindaries* find a great help in the Penal Code in Vernacular.

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This Code has its own defects and they were foreseen and noticed by its draftsmen "Such is the relation" says Lord Macaulay (1) "which exists between the different parts of the law, that no part can be brought to perfection while the other parts remain rude. The Penal Code cannot be clear and explicit while the substantive civil law and the law of procedure are dark and confused." For, in every system of law, the department, which contains the penal provisions of the law, is added as a guard to the rest of the system, the existence of which, in some form or other, is assumed. A Penal Code assumes that there exist laws creating and defining rights, imposing duties, and providing means for the protection and enforcement of these rights and duties; and that what is commanded or authorized by these laws may well be ascertained. The provisions of a Penal Code are only some of the means of compassing the ends of substantive laws, which are the laws that define civil rights and duties. The rights, duties, and powers which these laws create are secured by the penal law, which may be regarded as a part of the subsidiary law for causing the principal laws to be observed and executed. Some acts in breach of these principal laws are thought fit, on account of the mischievous consequences they have a natural tendency to produce, to be constituted crimes or offences; and to put a stop to such consequences, there is annexed to every such act a certain artificial consequences consisting of punishment to be inflicted on the doer.

A Penal Code, that is a Code of offences and punishments, is thus an auxiliary to the other departments of the law. If many important questions concerning rights and duties are undetermined by the Civil law, it must often be doubtful whether the provisions of the Penal Code do or do not apply to a particular case; we cannot know correctly if any given act is to be counted an offence under the latter, while it is uncertain what recognition the civil law gives to the right which has been infringed. A Penal Code therefore necessarily partakes of the vagueness and uncertainty of the rest of the law. It cannot be clear and explicit while the substantive civil law and the law of procedure are dark and

(1) *Letter from Lord Macaulay to Lord Auckland* Dated 14th, October, 1837, §4.

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confused. While the rights of individuals and the powers of public functionaries are uncertain, it cannot always be certain whether those rights have been violated or those powers exceeded. But if a Code of offences and punishments is necessarily imperfect while other parts of a system of law are so, its defects may, in some degree, be removed by the mode in which the definitions of offences are framed. Hence is the importance of definitions given in the Indian Penal Code

When we remember that the Indian Penal Code was passed in 1860 and that, except a few minor amendments, it is the same now as it was in 1860, and that it is still sufficient not only for this country but also for other British possessions, we cannot but say with Sir James Stephen that the Indian Penal Code has been "triumphantly successful". The Indian Penal Code, as given in the last edition of the unrepealed general Acts of the Council of the Governor-General of India, embodies all the subsequent changes made in it.

But the Penal Code does not affect the special and local laws and there are other Acts which contain penal laws of India and those I shall mention in the following list —

- (1) Ben Reg XII of 1817 § 30 (Falsification of accounts)
- (2) Act XXIV of 1855 (Penal Servitude)
- (3) Act XLV of 1860 (Penal Code, with its amending Acts)
- (4) Act IV of 1872 §39 (Punjab Laws).
- (5) Reg. III of 1872 §3 (Santhal Parganas Laws).
- (6) Reg. V of 1872 §§7, 11 (Sindh Frontier).
- (7) Act XV of 1874 §3 (Laws Local Extent).
- (8) Reg IX of 1874 §3 (Laws Arakan Hill Districts)
- (9) Reg. III of 1877 §29 (Laws Ajmere).
- (10) Act XV of 1882 Ch XII (Presidency Small Cause Courts).
- (11) Act IX of 1890 §130 (Railways).
- (12) Reg I of 1890 §3 (Laws. British Beluchistan).
- (13) Reg I of 1894 §3 (Laws. Angul).
- (14) Reg I of 1895 §3 (Laws. Kachin Hills).
- (15) Reg V of 1896 §3 (Laws. Chin Hills).
- (16) Act X of 1897 §§25, 26 (General Clauses Act).
- (17) Act V of 1898 §§44—45, Ch IX, §§195—199, §§345, 480—482, 521 (Criminal Procedure Code).

- (18) Act VI of 1898 §17 (Post Office) LEC. VI.
- (19) Reg I of 1900 §4 (Whipping. Chittagong Hill tracts). Other penal laws
- (20) Reg III of 1901 §§6, 12 (Crimes Frontier).
- (21) Bom. Act IV of 1902 §§40—44 (Police. Bombay City)
- (22) Act VI of 1908 (Explosive Substance Act).
- (23) Act XIV of 1908 (Criminal Law Amendment)
- (24) Act IV of 1909 (Whipping).
- (25) Act IX of 1910 §39 (Electricity ; theft).
- (26) Act X of 1911 §§6, 7 (Seditious Meetings).
- (27) Act IV of 1889 (Merchandise Marks Act) §3 has amended Ch. XVIII of the Indian Penal Code (§§478—489).
- (28) The Cattle Trespass Acts
- (29) Workman's Act of 1859 (XIII of 1859 , IX of 1860)
- (30) Reformatory Schools Act (VIII of 1897).
- (31) Police Acts Applicable to different parts of the country. There are 64 enactments (Regulations and Acts, Imperial and local) bearing on this subject Act V of 1861 and III of 1888 contain the law relating to the Regulation of Police and have been put under heading "Substantive law, Public, Regulative"
- (32) Gaming Acts —
- (i) Act XXI of 1857 §§ 10—15 (Howrah Offences Act)
- (ii) „ III of 1867 (Public gaming Act).
- (iii) „ IX of 1872 §30 (Contracts Act).
- (iv) „ XIII of 1881 §3 Sch. (Fort William).
- (v) Bom. Act III of 1865 (Contract)
- (vi) „ „ IV of 1887 (Gaming Bombay Presidency).
- (vii) Bom Act IV of 1890 (Police, Bombay District).
- (viii) Bom. Act IV of 1902 §126 (Police Bombay City)
- (ix) Ben. Act IV of 1866 §§3, 44—51 (Police, Calcutta).
- (x) Ben. Act II of 1867 (Gaming. Bengal).
- (xi) Ben. Act III of 1897 §1 (Rain Gambling).
- (xii) Bur. Act I of 1899 (Gambling, Burma)
- (xiii) Bur. Act IV of 1899 §8A (Police, Rangoon)
- (xiv) Bur. Act I of 1905 (Burma Gambling Act).

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(xv) Mad. Act III of 1888 §§3, 23, 42-51, 72
(Police Madras City).

Other penal laws.

(xvi) Mad Act III of 1889 §§1, 3, 6-9.

When the object of all these Acts is the same it is desirable to have one General Act instead of so many local and special Acts, especially when we see that the terms "common gaming house" and "penalty for owning common gaming house" have been dealt with separately in some of these Acts, e g, the term "Common Gaming house" has been defined by—

- (i) Act XXI of 1857 §59
- (ii) Act III of 1867 §1
- (iii) Ben. Act IV of 1866 §3.
- (iv) Ben. Act II of 1867 §1
- (v) Ben. Act III of 1897 §1 (3).
- (vi) Bom. Act IV of 1887 §3.
- (vii) Bur. Act I of 1899 §3 (1)
- (viii) Mad. Act III of 1888 §3.

Penalty for owning or keeping common gaming house has been mentioned in—

- (i) Act XXI of 1857 §§10, 11
- (ii) Act III of 1867 §§3, 4
- (iii) Ben Act IV of 1866 §§44, 15
- (iv) Ben. Act II of 1867 §§3, 4.
- (v) Bom. Act IV of 1887 §§4, 5
- (vi) Bur. Act I of 1899 §§11, 12
- (vii) Mad. Act III of 1888 §§45, 46
- (viii) Mad. Act III of 1889 §§6, 7
- (ix) Ben. Act IV of 1913 (The Bengal Public Gambling (Amendment) Act, 1913).

In the next lecture I shall deal with the progress of codification of substantive private law and Adjective Law.

LECTURE VII.

PROGRESS OF CODIFICATION IN BRITISH INDIA.

SUBSTANTIVE (PRIVATE) AND ADJECTIVE LAW.

Following the classification of Substantive private law given in the last lecture, I shall begin this lecture with the subject of civil wrongs. The law relating to wrongs has not yet been codified in British India and there is a distinct and very important gap in our legislation. "A good law of torts" said Sir James Stephen (1) "would be a great blessing to this country. It would enable the legislature to curtail very greatly many of the provisions of the Penal Code, which are at present called into play on the most trifling occasions to gratify private malice. The provisions on defamation, for instance, clearly ought to belong to the law of wrong and not to the law of crimes." Sir Henry S. Maine writing in 1879 remarked (2) "Civil wrongs are suffered every day in India, and though men's ideas on the quantity of injury they have received may be vague, they are quite sufficiently conscious of being wronged somehow to invite the jurisdiction of courts of justice. The result is that, if the legislature does not legislate, the Courts of justice will have to legislate, for, indeed, legislation is a process which perpetually goes on through some organ or another wherever there is a civilized government, and which cannot be stopped. But legislation by Indian Judges has all the drawbacks of judicial legislation elsewhere, and a great many more. As in other countries, it is legislation by a legislature which, from the nature of the case, is debarred from steadily keeping in view the standard of general expediency. As in other countries, it is haphazard, inordinately dilatory, and inordinately expensive, the cost of it falling almost exclusively on the litigants. In British India judicial legislation is, besides, in the long run, legislation by foreigners, who are under the thralldom of precedents and analogies belonging to a foreign law, developed thousands of miles away, under a different climate, and for a different civilization. I look with dismay, therefore, on the indefinite postponement of a codified law of tort for India."

Substantive,
II Private.

(a) Civil Wrongs.

Sir James Stephen.

Sir H. S. Maine.

(1) *Gazette of India, Supplement.* 1872, May 4.

(2) *Minute by Sir H. S. Maine* Dated 17th July 1879.

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This was in 1879 and towards the end of 1882 Sir Frederick Pollock was asked by the Government of India to prepare a draft Bill to codify the Law of Civil Wrongs. The draft was provisionally completed in 1886 and was published with the consent of the Secretary of State for India. But the Government of India has not yet finally decided whether it is desirable to codify the law on this subject. The objects of the Government of India in adopting this course seem to be (a) not to do anything which may offend the feelings of some of the people of the country; (b) to avoid the introduction of rules of English law on the subject into this country. But these objects have been frustrated by the judiciary which cannot but legislate by its decisions on the subject when a large number of cases on torts come up before it for decision. I shall take here only one example viz whether mere use of abusive and insulting language e.g. *Sala* (wife's brother), *haramzada* (base-born or bastard); *soo* (pig) *baperbeta* (son of the father i.e. ironically, bastard) is actionable irrespective of any special damage.

Tort
Use of abusive
language.

Institute of
Vishnu

(*Vākparushyam*)

Calcutta.

According to the common law in this country, as expounded in the text of the sages, verbal abuses are punishable (1). Then, since the establishment of the High Court in Bengal, it has almost invariably been held that verbal abuse, though no actual damage has been caused, is actionable. "The words" says Norman C. J. (2) "which are of the coarsest abuse, do undoubtedly impute that to the plaintiff which would, if believed, have been hurtful to the feelings of his family and have lowered his character in respect of his caste, and the uttering of them, therefore, amounts to an offence under §499 of the Penal Code. Applying the test familiar to English law, the uttering of the words in question, standing by itself, was a wrong, and therefore gave to the individual aggrieved by it a right of action independently of any proof of special damage or actual pecuniary injury. . . . No doubt actions for slander are often vexatious. But to prevent people from taking the law into their own hands, and for the preservation of peace and order, it is a matter of the greatest importance that Courts of Justice should afford an effectual remedy to persons feeling themselves aggrieved by wanton and virulent

(1) *Institutes of Vishnu. Sacred Books of the East* Vol VII. Ch. V. Ver. 23, p. 27. Vol xxxiii p. 207. Mandāik's *Yyavahara Mayukha* p. 138 & p. 232. *Yajnavalkya Dharmashastram Yyavahārdhivaya*. Ch. II. V. 205. "Any one abusing another thus" I shall have criminal connection with thy sister or thy mother," shall be made by the King to pay a fine of twenty-five *panas*.

(2) *Kannoo v. Rahamoolah* (1864) W. R. Gap. No. p. 269.

abuse." In *Sreenath v. Komul* (1) Mitter J. observed "We think that the judge is wrong in holding that the abusive words complained of by the plaintiff in this case are not actionable. It is true that the plaintiff might have instituted proceedings against the defendant in the Criminal Court ; but his failure to do so does not deprive him of his right to bring a suit in the civil court. The case is governed by the ruling of a Division Bench of this Court in the case of *Kali v. Ramgali* (2) " The words alleged to have been used were certainly such as to wound the feelings of the plaintiff. The case was remanded for the purpose of a finding upon the question whether the defendant did use the words imputed to him or not. In *Ibin Hossein v. Haidar* (3) Field and O'Kincaly JJ. took practically the same view of the law. In *Jogeswar v. Dinaram* (4) Banerjee and Wilkins JJ expressed themselves as follows — "Though the rule of English law requires proof of special damage to sustain an action for slander except in certain cases, and though there is some conflict of authority in this country, the later cases are in favour of the view that where the abusive language used is such that, having regard to the respectability and position of the person abused, it is calculated to outrage his feelings or lower the estimation in which he is held by persons of his own class, and so bring him into disrepute, it is actionable without proof of special damages".

In other provinces, also, very nearly the same view has been adopted. In Bombay (5) Couch, C. J., followed the rulings of the Calcutta High Court, and held that the case should be decided according to the principles of justice, equity and good conscience ; and he was of opinion that mere verbal abuse without proof of actual damage was actionable. In Madras the question viz. whether an action for damages for slander can be maintained without proof of special damages in cases in which it would not be allowed in English Courts, came up before Turner C. J. and Muthusami Ayyar J and their Lordships observed "In this country we are not bound to adopt the rules regulating compensation for injuries which are recognized by the English Courts, though it has been the practice of Judges in British India

(1) (1871) 16 W.R. 83.

(2) (1870) 16 W R 81 note ; 6 B L. R. Ap. 90 In *Srikant v. Salcoot* (1878) 3 C. L. R 181. Mitter and Maclean JJ. took the same view.

(3) (1885) 12 C. 109.

(4) (1898) 3 C. L. J. 140.

(5) *Kashiam v. Bhadu* (1870) 7 Bom II. C. A C 17.

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to regard the decisions of the English Courts with the highest respect as embodying the wisdom and experience of a judiciary whose reputation is second to none for independence and ability.

Madras.

“But the distinction drawn by the English law between written or printed and oral slander, which is said to have had its origin in the circumstance that the most frequent instances of oral slander were at one time punishable by Ecclesiastical Courts (2 Salkeld. 694), has been condemned by many eminent English lawyers. Mr. Starkie observes that the distinction “must be regarded as an absolute peremptory rule not founded in any obvious reason or principle.” In *Roberts v. Roberts* (1) Cockburn C J., and Crompton and Blackburn, JJ., pronounced the law of England unsatisfactory and regretted they were bound by it. In *Lynch v. Knight* (2), the Lord Chancellor Campbell expressed the same views, and Lord Brougham, in the same case, declared that the English law was in this respect not only unsatisfactory but barbarous.

“The Indian Law Commission, of which Lord Macaulay was a member, in its report on the proposed Penal Code, demonstrated that the English law regarding defamation was inconsistent and unreasonable (3). The Civil Law does not recognize the distinction, nor does the law of Scotland; and the recommendations of Lord Macaulay’s Commission were approved and accepted by the British Indian Legislature. We therefore feel justified in giving effect to our conviction that the rule we are considering is not founded on natural justice and should not be imported into the law of British India. . . . It is often impossible to bring specific proof of the damage which a man may suffer in his business or in his friendships from such an injury. The injury may be occasioned before he has any opportunity of rebutting the slander, and the memory of the slander may survive its contradiction and may at any time influence his neighbours unconsciously to his disadvantage; nor is the suffering trivial which such a wrong may inflict on its victim. . . . Wider experience has persuaded English Judges that frivolous and vindictive litigation is countenanced by conceding too great liberty for the institution of suits for defamation, and it has been the object of the English law so far as possible to set limits to such actions. Some of the res-

(1) (1864) 33 L. J. Q. B. 249; 2 B & S. 384.

(2) (1861) 9 H. L. 577.

(3) Macaulay’s *Draft Penal Code*. Note R.

tictions are already recognized by Indian law Words of LEC. VII.
 mere vulgar abuse are not punished as defamation. But we
 are not prepared to accept the limitation of the English law,
 which denies a civil remedy unless pecuniary damage is
 established or may be predicted as almost certainly probable.
 Mere hasty expressions spoken in anger or vulgar
 abuse to which no hearer would attribute any set purpose
 to injure character would of course not be actionable, but
 when a person either maliciously or with such carelessness
 to enquire into truth as is sometimes described as legal
 malice, deliberately defames another, we conceive that he
 ought to be held responsible for damages for the mental
 suffering his wrong-doing occasions Without accepting
 the very wide rule of the Scotch law, that anything is action-
 able which produces uneasiness of mind (Starkie, p 30), we
 consider the action should be allowed where the defamation
 is such as would cause substantial pain and annoyance to the
 person defamed, though actual proof of damage estimable in
 money may not be forthcoming (1).

In *Dewan Singh v Mahip Singh* (2) Mahmood J. after Allahabad.
 referring to the different cases of the different High Courts,
 expressed the opinion that the distinction between verbal
 and written slander should not be adopted in this country
 and remarked "It can scarcely be doubted that these various
 rulings leave the law in a very unsatisfactory condition and
 there is need for legislative interference. What form that
 interference should take is a question which, in my opinion,
 should be determined according to the conditions of life and
 the feelings of the people of India. And, looking at the
 matter from this point of view, I have no doubt that the
 seven rulings of the Calcutta High Court which I have enu-
 merated above lay down the rule most suitable for India,
 though it is more in conformity with the Roman than the
 English law. I confess I can see no reason why per-
 sonal insult and consequent mental distress should not be
 recognised as constituting a substantive cause of action in
 our proposed law of torts. In enumerating personal rights
 the Civil Code of New York (§27) lays down that every
 person has "the right of protection from bodily restraint or
 harm, from *personal insult*, from defamation and from in-
 jury to his personal relations." If, then, personal insult is
 a wrong as distinct from defamation as assault, there seems
 no reason why it should not be regarded as distinct tort A

(1) *Parvathi v. Manna*, (1884) 8 M 175, 178—180.
 (2) (1888) 10A 425, 441.

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Allahabad.

tort is only an injury to a legal right not arising out of contract between the wrong-doer and the person wronged ; and in my opinion, if the right of protection from personal insult is violated, such violation should be recognised as a cause of action for recovery of damages as much as assault. Such is apparently the rule of the Roman Civil law, and of the law of Scotland, both of which recognise mental distress as in itself constituting an injury. Moreover, the view, which I have here ventured to express would, if adopted, be in keeping with the notion of injury as understood in the Indian Penal Code (§44), where it is taken to denote 'any harm whatever illegally caused to any person in body, *mind*, reputation or property' . . . The reasons ordinarily employed against this view are that 'abusive, insulting and unmannerly language which affects not a man's liberty or estate are of too indefinite and uncertain a character to be subject of an action for pecuniary damages. Such injuries, rather affronts to the feelings, are as incapable of definition as they are of admeasurement. They depend upon the rank, situation and condition of the parties, and on circumstances which may be felt but not defined ; they may depend on the tone of voice, the gestures, even looks by which they are accompanied, and in some instances, silence may be more contemptuous and insulting than direct expressions' (Starkie, p. 17). It is submitted that these objections apply equally to almost all personal injuries (such as assault, defamation, false imprisonment etc.), in which mental suffering is recognized as an element of assessing damages ; so much so that there is no fixed rule for estimating damages in such cases, and the matter is usually left to the discretion of the jury with reference to the circumstances of aggravation or mitigation as the case may be. In India such questions would have to be decided by the Judge, and I can anticipate no impossibility in arriving at a fair assessment of damages in cases of personal insult as distinguished from defamation. Unadvanced countries like India present a state of society where personal insult need more check than in more civilized countries like England."

Such was the state of law on this subject when the question under discussion, namely whether abusive and insulting language, e.g. *Sala*, *Haramzada*, *Soor*, is actionable irrespective of any special damage, came up before a Full Bench of the Calcutta High Court and the matter was fully discussed (1). The majority of the Full Bench

(1) *Girish v Jatadhari* (1899) 26 C 653.

(Maclean, C. J., Macpherson, Hill and Jenkins JJ) held that mere use of abusive language e.g. *Sala, Soor* etc. apart from defamation, is not actionable irrespective of any special damage. But Ghose J. held that a person thus vilified should be entitled to maintain an action irrespective of any special damage. In this case the Lower Appellate Court said "No one who heard him did or could imagine that he really meant to asperse the chastity of the plaintiff's sister or mother or thought the plaintiff a pig. There was no defamation or intent to defame. What the defendant did was insulting, but did not affect the plaintiff's reputation a whit." Referring to this finding the Full Bench remarked "This finding wholly excludes that which is an essential element of actionable defamation, and it therefore is outside the scope of our inquiry to determine whether or not the English rule which requires special damage to be established in an action for oral defamation should prevail in this country. We therefore only have to consider whether an action will lie for insult or abuse, with resultant pain and distress of mind, apart from defamation. The first question ... is what is the gist of this actionable wrong? In the argument before us it was suggested that the cause of action was the injury to the abused man's feelings, his mental distress and pain. It is difficult to suppose that the causing of mental distress and pain can *per se* be actionable. Mental condition of this sort may obviously arise from causes other than abuse or insult, and a moment's reflection makes it clear that the proposition thus widely expressed would lead to manifest absurdities. It is said that the reported decisions of the Indian Courts, and in particular of this Court, support the position that, to cause mental pain and distress by insult or abuse, as distinct from defamation, is actionable, and a large number of authorities have been cited to us as establishing this ... Many of them are so inadequately reported that it is impossible to discover what was the state of facts then under consideration ... From a perusal of those cases in which the facts are set out, it is apparent that in each there was sufficient to support a suit for defamation (1). In none of the cases was the point raised or at any rate determined, whether abuse, as distinct from defamation, was actionable, the question rather being whether proof of special damage was an essential condition of the plaintiff's suc-

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Girish v Jatadhan
(1899) 26C 653
(F B).

(1) But judgment in each case, it is submitted with due deference, was given not on the ground that there was sufficient to support a suit for defamation but on the ground of mental pain and distress.

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cess" Their Lordships then referred to two cases in which it was held that such suits would lie. "Apart then from authority" said their Lordships "ought mere personal insult or abuse, as distinct from defamation, and not touching the plaintiff's credit or reputation, to be actionable in this country, if it produce mental pain or distress. It has been urged that insult being punishable under the Penal Code, as it was under the old Hindu Penal system, it must be sufficient groundwork for a civil suit. But, though the facts which go to make a penal offence may, in general, suffice to constitute a civil wrong, it requires no exhaustive examination of the forms of civil and criminal liability to show that the latter is no infallible guide to the former. This appears to us to be made clear by the very section of the Penal Code which prescribes a punishment for insult, for the purpose of the penalty imposed is to prevent a breach of the peace." Then their Lordships said that public policy did not demand that they should hold that such suits are maintainable. Therefore the majority of the Full Bench held that abusive and insulting language, not amounting to defamation, was not actionable.

But Ghose J dissented and held the contrary view.

*Bhooni Money v.
Nalabar* (1901)
28C. 152

Then in 1901 the case of *Bhooni Money v Nalabar* (1) came up before Mr Justice Harington, sitting on the Original side of the High Court. The slanderous words used in this case were "You are a prostitute. I will publish before all the caste people that you are a prostitute. I took you to the garden-house at Kalghat .. with you." After examining the facts his Lordship said "I find that the defendant spoke and published the words complained of by the plaintiff, that those words conveyed the imputation that the plaintiff was unchaste, that they were spoken falsely and maliciously, but that they caused the plaintiff no actual damage whatever.

"On these facts two contentions are raised by the plaintiff: (i) That the words convey an insult and that for the mental distress caused by such insult, damages are recoverable, and (ii) that the words are defamatory, and are actionable without special damage."

On the first issue his Lordship, following the judgment of the majority of the Full Bench in *Girish v. Jaladhari* (2) held that words of abuse causing mental distress are not *per se* actionable.

(1) (1901) 28C. 452.
(2) (1899) 26 C. 653.

On the second issue (whether defamatory words imputing unchastity to a woman are actionable in this country without proof of special damage) his Lordship held that such defamatory words are not actionable without proof of special damages. "Under the law of England" said his Lordship (1) "as it stood prior to 1891 such words would not have been actionable without proof of special damage. Is that law to be applied in this country? It is stated in Morley's Digest, Vol I, p. XXII that the Common Law of England, as it prevailed in 1726, is the law administered by the Supreme Courts, and that statement is treated as correct by Lord Kingsdown in the case of the *Advocate General of Bengal v Surnomoyee* (2) in which he observes that "the English law, civil and criminal, has been usually considered to have been made applicable to natives within the limits of Calcutta, in the year 1726 by the Charter 13 Geo I" This must be taken subject to certain limitations, many provisions of the English law, as for example that under which bigamy is a felony, were obviously unsuitable to the natives of this country and were therefore not introduced.

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(a) Tort.

"But there is nothing unreasonable, having regard to the customs of this country, in holding that, that part of the Common Law of England which gave a person injured by slanderous words the right to recover damages in an action has been introduced. In my opinion, it is by virtue of the Common Law of England introduced into Calcutta by the Charter of 1726 that the action is maintainable." His Lordship referred to the *Slander of Women Act, 1891* (54 and 55 Vic. c 51) in the following terms — "These are the exceptions; in all other cases (except those arising under the *Slander of Women Act, 1891*) the regular rule is followed, namely, that words to be actionable must be proved to have caused actual damage". The *Slander of Women Act, 1891* has abolished the need of showing special damage in the case of words which impute unchastity or adultery to any woman or girl. "The Courts" says Sir Frederick Pollock "might without violence have presumed that a man's reputation for courage, honour, and truthfulness, a woman's for chastity and modest conduct, was something of which the loss would naturally lead to damage in any lawful walk of life. But the rule was otherwise . . . The law went wrong from the beginning in making the damage and not the insult the cause of action."

(1) (1901) 28C 452, 462.

(2) (1863) 9 Moo I.A 387, 426.

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Thus, on the question whether mere use of abusive language causing mental distress is actionable or not, there is a difference of opinion. Eminent Judges like Couch C J., Turner C. J., Mathusamy Ayyar,, Mitter, Sir Gooroodas Banerjee, Sir C, M, Ghose, Straight and Mahmood have answered the question in the affirmative, while eminent judges like Sir Lawrence Jenkins C. J , Sir Francis Maclean, and Macpherson have answered the question in the negative. From the remarks of Sir Frederick Pollock quoted above it seems that that eminent jurist is of opinion that the question should be answered in the affirmative. It is time that Legislature should interfere and decide the question according to the conditions of life and feelings of the people of India as expressed by Sir R C. Mitter, Sir Mathusamy Ayyar, Mahmood, Sir Gooroodas Banerjee and Sir C M Ghose.

The law of remedies in cases of torts has been to some extent codified by the Specific Relief Act. Granting of injunction in cases of torts is now regulated by §§54-55 of the Specific Relief Act. But these sections introduce no new principles of law into India, but they express in general terms the rules acted upon by Courts of Equity in England, and long since introduced into this country, not because they were English law, but because they were in accordance with equity and good conscience (1)

(b) Law of Property.

33 Geo III
c.52 §131.

Under 33 Geo III c. 52 (1793) no European was allowed to come to India without the leave and licence of the East India Company. In that Statute we find "That if any subject or subjects of His Majesty, his Heirs or Successors, of or belonging to Great Britain, or any of the Islands, Colonies or Plantations aforesaid, not being lawfully licensed or authorized, shall at any time or times before such determination of the said Company's whole and sole trade, as is hereinbefore limited, directly or indirectly go, sail or repair to, or be found in the East Indies, or any of the parts aforesaid, all and every such person and persons are hereby declared to be guilty of a high crime and misdemeanor, and being convicted thereof shall be liable to such fine or imprisonment or both fine and imprisonment, as the court in which such person or persons shall be convicted shall think fit" (2). They were also liable to be arrested and sent to England for trial (3). Then again even those

(1) *Shamnugger Jute Factory v Ram Naram* (1886) 11C 189, 199.

(2) (1793) 33 Geo. III c.52. §131.

(3) *Ibid.* §132.

who were licensed by the Company "to go or to live or continue in India" had to reside in one of the principal Settlements of the Company, or within 10 (ten) miles of such principal Settlement. They could not live anywhere else, "without the special License of the said Company, and of the Governor-General, or Governors of such principal Settlement, in writing, for that purpose first had and obtained" (1). Such restrictions on the movements of non-Indians had been imposed for a long time to protect the trade of the East India Company. We find the following in Colebrooke's Supplement to the Digest of Regulations. "Advertisement published by the Board of Revenue on the 11th November 1790.

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Advertisement,
11th Nov 1790.

"The Governor-General in Council having been pleased to direct, under date the 3rd instant, that no European shall be allowed to possess or occupy ground, without the limits of Calcutta, now the property of natives, or erect any buildings thereon, without the sanction of the Board of Revenue; public notice thereof is hereby given, and all Europeans who may be hereafter desirous of possessing or occupying ground, the property of natives without the said limit, or of erecting buildings thereon, are required to make previous application to the Board of Revenue, who will thereupon order the quantity and rent of the ground to be ascertained by the Collector in whose district it may be situated, previous to the execution of the Pottahs" (2)

Section 17 of Reg. II of 1793 laid down the rule that no Collector should give land in farm to any European directly or indirectly

Reg. II of 1793 §17

This restriction was removed by "*The Property in Land Act, 1837*" passed pursuant to the Government of India Act, 1833 (3 & 4 Will IV. c. 85) §86 which provided "it shall be lawful for any natural-born subject of His Majesty authorized to reside in the said territories to acquire and hold lands, or any right, interest, or profit in or out of lands, for any term of years, in such part or parts of the said territories as he shall be so authorized to reside in." By §1 of the *Property in Land Act, 1837* it was declared lawful for any subject of His Majesty "to acquire and hold in perpetuity, or for any terms of years, property in land, or in any emoluments issuing out of land" in any part of British India.

Property in land
Act, 1837
(IV of 1837)

(1) (1793) 33 Geo. III c. 52 §98.

(2) Colebrooke's *Supplement* p. 355.

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Reg. VII of
1832, §9

Act XXI of 1850

"Landholders'
Public charges
and Duties Act,
1853" (II of 1853).

Then there was another kind of restriction viz. of caste disabilities. Loss of caste amongst the Hindus was generally accompanied with loss of proprietary rights; but in 1832 it was enacted that "whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled. In all such cases, the decision shall be governed by the principles of justice, equity and good conscience ; it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by those principles" (1) This provision, which was in force only in the provinces subject to the Presidency of Fort William was extended throughout the territories subject to the Government of the East India Company by Act XXI of 1850 commonly known as "*the Caste Disabilities Removal Act, 1850*" This Act consists of 1 section only which enacts that law or usage which inflicts forfeiture of, or affects rights on change of religion or loss of caste should cease to be enforced.

When the *Property in Land Act, 1837* (IV of 1837) made it lawful for any subject of His Majesty to acquire and hold in perpetuity, or for any term of years, property in land, or in any emoluments issuing out of land in any part of British India, doubts arose whether all subjects of His Majesty were subject to the same jurisdictions as Natives for enforcing discharge of public and police duties incident to the holding of such property or for the enforcement of public charges and assessments upon or in respect thereof.

This question was settled by the *Landholder's Public Charges and Duties Act, 1853* (II of 1853) Section 1 of this Act provided that no such landholders, by reason of his place of birth, or by reason of his descent, should be exempt from any public charge or assessment, or from any duty connected with the police or from any duty whatsoever of a public nature Section 2 provided that for default

(1) (1832) Reg. VII of 1832 §9. (repealing §6 of Reg. V of 1831). This Reg. had been repealed by the *Bengal Civil Courts Act* of 1871 (VI of 1871) which has been repealed by the *Bengal N.-W. P. and Assam Civil Courts Act, 1887* (XII of 1887).

in respect of such charges and duties, they should be sub- LEC. VII.
 ject to the same laws, regulations and procedure, and to the
 same jurisdictions, as if they were the natives of the country.

The legislative enactments on this subject are very few
 and are of local application only. The enactments are
 (i) *The Alluvion and Diluvion Regulation* (Bengal) 1825, Alluvion and
 (ii) *The Bengal Alluvial Land Settlement Act*, 1858 (XXXI Diluvion.
 of 1858) (iii) *The Bengal Act IV* of 1868 The Bengal
 Regulation of 1825 has been extended to Sonthal Par-
 gannahs, the Punjab, the N -W. Frontier Provinces, Oudh,
 the Central Provinces and Sambalpur district. Importance
 of the subject drew the attention of the Anglo-Indian legis-
 lators and attempts had been made to have the law on the
 subject codified, but without any avail. The draft Bill
 of Dr. Stokes and the Tagore Law Lectures on this sub-
 ject by Mr Lal Mohan Dass, with necessary alterations in
 consequence of several important judicial decisions, will
 supply valuable materials for a code on this subject

On the 5th September 1878 the then Law Member
 (Dr Stokes) moved for leave to introduce a Bill to define Dr Stokes'
 and amend the law relating to alluvion, islands and aban- Alluvion Bill.
 doned river beds, and said that the Alluvion Bill, like the
 Transfer of Property Bill and the Negotiable Instruments
 Bill, was intended to form a chapter of the Indian Civil
 Code, and its object was to state, in a concise, accurate and
 accessible form, the law relating to the ownership of allu-
 vial lands, of the islands (commonly called *chais*) formed
 in rivers or in the sea, and of abandoned river-beds In
 Madras, Bombay and Burmah there was no statutory law
 on the subject, in Sindh there were only some executive
 rules framed in 1852 by Sir Bartle Frere which were held
 to have the force of law : in the rest of British India the law
 was contained partly in legal text-books, partly in the
 Bengal Regulation XI of 1825 and the Bengal Act IV of
 1868, sections 2 and 4, but chiefly in the numerous deci-
 sions of the High Courts and the Judicial Committee of the
 Privy Council with which the former enactment was
 encrusted. There were several important omissions in the
 Bengal Regulation of 1825. The Bill attempted to supply
 those defects. But the Bill left untouched the law relating
 to the assessment of alluvial lands and lands diminished
 by diluvion ; to the rent payable in respect of such lands,
 and to the rights of tenants and mortgagees to alluvial lands.
 Such matters were more fitly provided for in special enact-
 ments dealing with revenue, rent, mortgages and leases.

Lec. VII

This Bill was introduced on the 2nd October 1878, referred to a Select Committee and it was also directed that the Bill should be published in the local official Gazettes. The Select Committee presented its Preliminary Report on the 19th March 1879. But nothing was done in the matter and the whole thing was dropped. It is time that the law on the subject should be codified. Dr Stokes' Bill may be used, with few necessary alterations, as the basis of the Code.

Though the Alluvion Bill drafted by Dr Stokes never became law, his Trust Bill and Easements Bill were passed in 1882. Dr Stokes also remodelled the Transfer of Property Bill originally drawn in England by a Law Commission and this Bill was remodelled to such an extent that only five of the original sections remain in substance in the present Transfer of Property Act (IV of 1882).

Transfer of
Property Act

The *Transfer of Property Act* of 1882 is intended to provide a Code of Property Law for those parts of British India to which it might be applied. In order to complete the plan on which the measure was drafted, the learned draftsman thought it necessary to insert a Chapter—Chapter VIII—dealing with actionable claims. The sections of that Chapter in the Act of 1882, were expressed in very wide and general terms and their interpretation gave a good deal of trouble to the Judges. Some of them were so wide that they seemed to go beyond what the policy of the law required and to make unnecessary differences between the law of England and the law of British India. When the amendment of that Chapter became necessary, opinions of Local Governments and the authorities representing the legal profession were asked for and on the basis of the opinions and suggestions received, a redraft of the whole Chapter was prepared by the then Law Member, which was afterwards adopted by Sir T. Raleigh who introduced it as a Bill on the 14th July 1899 which afterwards became Act II of 1899 (1).

Another important branch of law of property has been dealt with by the Tenancy Acts of different provinces. The condition of people and the customs and usages of land-tenure are so different in different parts of India that it is impossible to have all the Tenancy Acts consolidated. There are some fifty-two (52) different enactments governing the relation between landlords and tenants in different

(1) *Abstracts of Proceedings* (1899) Vol XXXVIII. p. 284. Also for 1900, p. 30.

parts of the country. The following are some of the important enactments regulating the relation between landlords and tenants.—

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- Tenancy Acts
- (1) AJMERE. Reg. II of 1877 §§41—56 (Land and Revenue, Ajmere).
 - (2) ASSAM. Beng Act VIII of 1869 (Agricultural Tenancies, Assam).
Beng Reg. VIII of 1793 §§ 49—55 and 64—65 (Leases, Rent, Bengal and Assam).
 - (3) BENGAL (except Sambalpur District) Bengal Tenancy Act VIII of 1888 with its amending Acts Also Beng. Act VI of 1908 (Tenancy, Chota Nagpur).
Beng Reg. VIII of 1793 §§49—55, 64—65 (Leases, Rent, Bengal and Assam).
Beng Reg V of 1812 §§2—4 , 26, 72
Beng Reg. XVIII of 1812 §§2, 3(2)
Beng Reg XXIX of 1814 §§2—5.
Beng Reg VIII of 1819 (Patni Taluks , Leases ; Sale for arrears. Bengal and Assam)
 - (4) THE CENTRAL PROVINCES AND SAMBALPUR DISTRICT OF BENGAL. Act XI of 1898 (Landlord and tenant Central Provinces) Beng Act III of 1898 (Tenancy Amendment)
 - (5) BOMBAY. Bom Act. V of 1862 (Bhagdari and Narwadari Tenures)
Bom. Act I of 1865 §38 and Act I of 1880 (Khoti land).
 - (6) COORG. Reg. I of 1899 §§ 70, 94 (Landlords' arrears of revenue).
 - (7) MADRAS. (A) Madras city Mad. Act VI of 1867 (Land Revenue, city of Madras).
(B) Madras Presidency Mad Act I of 1908 (Fstates, Land).
Mad. Reg. XXV of 1802 §14.
 - (8) PROVINCE OF AGRA. U. P. Act II of 1902 (Tenancy Agra).
U P. Act III of 1901 (Land Revenue §§36, 56, 79 etc.)
 - (9) OUDH. Act XXII of 1886 (Agricultural Tenancies, Oudh).
U. P Act III of 1901 (Land Revenue.)
 - (10) THE PUNJAB & N. W. FRONTIER PROVINCE. Act XVI of 1887 (Agricultural Tenancies, Punjab).

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Act XVII of 1887 §§110—135, 158 (Land Revenue, Punjab).

Reg. XIII of 1887 (Agricultural tenancies. Hazara District, Punjab).

Act III of 1893 (Government Tenancies, Punjab).

Reg. III of 1904 (Tenancy, Hazra).

All these Regulations and Acts are of different origin and contain provisions which are dissimilar to each other in various respects, and there is no common basis on which a codifying Act may be based.

Now let us take the Bengal Tenancy Act (VIII of 1885) which amends and consolidates certain enactments relating to the Law of Landlord and Tenant in Bengal.

Bengal Tenancy
Act VIII of 1885

This Act is based on the recommendations of the Bengal Rent Commission appointed under Lord Lytton's Government in April 1879. But if we trace its ultimate origin, "we shall find" says Sir C. P. Ilbert (1) "that it embodies an endeavour to redeem a pledge which was given at the time of the permanent settlement." Before the passing of the Bengal Tenancy Act there had been a persistent demand for a revision of the existing law, not merely on points of detail, but on points of principles, not merely as to procedure, but as to substantive rights,

It is not a
complete Code.

But this Act is not a complete Code, even in respect of the law of landlord and tenant. It does not profess to incorporate the general principles of the law of contract and the doctrines of equity jurisprudence, in so far as they may have to be applied in the determination of disputes between landlords and tenants (2). Though the original Bill was examined and approved of by such an eminent jurist and draftsman as Sir C. P. Ilbert, it was soon found necessary to have the Act amended and it was amended the following year by Act VIII of 1886. It has also been amended by—

Beng. Act III of 1898 ;

Beng. Act I of 1903 ; and

Beng. Act I of 1907.

Thus this Act of 1885 has been amended and affected by four subsequent Acts within a quarter of a century. The original Act of 1885 and the first amending Act are Acts of the Imperial Council while the last 3 Amending Acts are Acts of the Provincial Council, passed

(1) *Abstracts of Proceedings*. 2nd Mar. 1883. p. 68.

(2) *Kripa v. Annada* (1907) 6 C.L.J. 273 (F.B.) S.C. 11 C.W.N. 983, 996.

with the previous sanction of the Governor-General under LEC. VII.
§5 of the Indian Councils Act 1892 (55 & 56 Vict. c 14.)

By these amending Acts—

Substantive.
Private.

2 sections of Act VIII of 1885 have been repealed
62 sections & Sch. III of Act VIII of 1885 have been
amended.

6 sections of Act VIII of 1885 have been supple-
mented and transfers made under 4 sections of
Act VIII of 1885 have been validated

Thus 74 sections of the original Act, which contains Bengal Tenancy
only 196 sections, have been affected by subsequent legisla- Act.
tion. Now all these changes have not been made by men of
the same mental calibre, and it is difficult to fit in the
different amendments into the main Act with the result that
law on the subject has become uncertain to some extent and
litigation has gone on increasing. Thus we find that
between 1896 and 1908 the High Court at Calcutta de-
cided about 500 cases in which the provisions of the Bengal
Tenancy Act were interpreted by the Judges of the High
Court. It is essentially necessary for the following two
reasons, that this Code should be revised as soon as pos-
sible ; firstly, the Act was passed more than a quarter of a
century ago and has been amended by 4 Acts drafted by
men of different mental calibre and secondly the large num-
ber of cases which come up before the High Court clearly
shows that the Act has not removed uncertainty of law on
this subject The Act has to be revised in the light of the de-
cided cases otherwise the Act itself will be the source of nu-
merous litigation. "If you want your laws to be really good
and simple" says Sir James Stephen (1) "you must go on re-
enacting them as often as such a number of cases are decided
upon them as would make it worthwhile of a law book-seller
to bring out a new edition of them."

The word "partition" had not been defined in any (b) Law of
British Indian enactment except in an United Provinces Property.
Act (2). But that Act deals only with partition and union Partition of
of *Mohals* in the United Provinces. So also the Bengal Property.
Estate partition Act (V of 1897) deals with the partition of
revenue paying estates. *The Indian Partition Act* has a
very limited application. So far as the partition of joint-
family properties is concerned, it is governed by the rules
of Hindu Law and the Anglo-Indian Statute book contains

(1) *Gazette of India*, Supplement May 4, 1877. p. 534

(2) U P. Act III of 1901 (*The United Provinces Land Revenue Act, 1901*) §106.

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(b) Law of Property.

Acts which deal with partition of Revenue-paying estates and the adjective law on the subject. The enactments relating to this subject are :—

- (1) Beng. Reg. VIII of 1793 §26 (Settlement, Bengal).
- (2) Mad Reg II of 1803 §§17, 18, 21—23 (Partition, Madras).
- (3) Beng. Reg. XVIII of 1812 §3 (Apportionment of land revenue, Bengal).
- (4) Beng. Reg VII of 1822 §12 (Settlement, Bengal).
- (5) Reg. III of 1872 §3 (Sonthal Parganas).
- (6) Reg II of 1877 §§8—19, 64, 72 (Land & Revenue, Ajmere).
- (7) Act II of 1884 (Partition-deeds, Madras).
- (8) Act IV of 1893 (Partition, British India).
- (9) Bengal Act V of 1897 (Estates partition, Bengal)
- (10) Act XIII of 1898 §4 (Laws, Burma).
- (11) Reg I of 1899 §§ 143, 145 (Coorg Land Revenue).
- (12) U P Act III of 1901 §§128, 138 (Apportionment of Rent)
- (13) Act V of 1908 §54 ; Sch I Ord XX. r. 18 ; Ord XXXVI rr 13, 14 (Civil Procedure).

Easements.

“It seems clear” says Norman J (1) “that servitudes were known and recognized both by Hindu and Mahomedan law. In the *Hedaya* (Hamilton’s Ed. Vol. IV p. 132) it appears that a right in the nature of an easement is acquired by one who digs a well in waste ground, *viz* , that no one shall dig within a certain distance of it, so as to disturb the supply of water. Rights to the use of water for purposes of irrigation or drainage are recognized and defined in pp. 136—155 of the same book. One urban servitude, at least, is mentioned, at p. 146 *viz* the right to discharge water on the terrace of another. I think there can be no doubt, that urban servitudes generally were recognized by Mahomedan law.

Hindu & Mahomedan Law.

“As to Hindu law, in Halhed’s *Gentoo Law*, p. 162, which is a translation of a compilation of the ordinances of the Pandits, made under the direction of Warren Hastings, between 1773—1775, it is laid down that “if a man hath a window in his own premises, another person having built a house very near to this and living there with his family hath no power to shut up that man’s window ; and if this

(1) *Bagram v. Khettranath* (1869) 3 B. L. R. O. C. J. 18, 37, 38.

second person would make a window to his own house, on the side of it, that is towards the other man's house, and that man at the time of constructing such window forbids and impedes him, he shall not have power to make a window." Many other species of servitudes are referred to in the same book." L_{EC.} VII.

The subject is also dealt with in the *Urvada Chintamani* pp. 124, 125 (published in 1863). Now the law on this subject is contained in "*The Indian Easements Act*" (V of 1882) and several other enactments, which have been mentioned by Mr F. Peacock in his Tagore Lectures for the year 1899 (1).

On this subject, the law is contained in several Statutes of the Imperial Parliament and several Acts of the Council of the Governor-General of India. The present day tendency is to have an Act which will be applicable throughout the whole British Empire and if that is not practicable, to have Acts for the different parts of the British Empire, based on the Statute on the subject passed by Parliament.

At present we have got the following Acts of the Government of India on this subject viz. Act XX of 1847 (*The Indian Copyright Act*, 1847) ; Act XXV of 1867 §§9—11, 18 (*Printing Presses & Books*). So far as the Copyright in Music, Drama and Fine Arts is concerned the law is contained in the following Statutes :—3 & 4 Wil. IV. c. 15 §§1, 2, 3 ; 5 & 6 Vict. c XLV. §§ 20, 22, 24 ; 25 & 26 Vict. c. 68 §§ 1—11. Copyright.
Literary

Music, Drama
& Fine Arts

The question of amending the Indian Copyright Act, 1847 (XX of 1847) has been considered on several occasions since 1864 on the ground that the Act was defective in several respects ; contained no provisions for Copyright in public lectures, sculptures, engravings, photographs and works of arts. In 1885 a Bill was prepared on the subject but legislation was then and has been subsequently postponed in view of the possibility of an amendment of the English Acts on the subject of Copyright. Copyright Act.
XX of 1847.

In 1908 a Convention to which Great Britain was a party was held in Berlin with the object of bringing the domestic laws of all countries concerned into harmony with one another so as to obtain international uniformity of treatment. The ratification of that Convention necessarily involved examination by a strong departmental committee of certain changes in the English law. Its provisions Berlin Convention,
1908.

(1) *The Law relating to Easements in British India.* 2nd Ed. pp. 48-54.

LEC. VII.

Imperial
Copyright
Conference, 1910.

pointed by the Board of Trade under the presidency of Lord Gorell which came to the unanimous recommendation that the Berlin Convention should be accepted by Great Britain with as few reservations as possible.

An Imperial Copyright Conference was subsequently convened in 1910 containing representatives of the self-governing Dominions and of the India Office, Colonial Office, etc. It endorsed the recommendations of the Board of Trade Committee and proposed that an Act dealing with the essentials of Imperial Copyright Law should be passed by Parliament and that this Act should extend to all British Possessions subject to the rights of self-governing Dominions and Possessions to modify or add to its provisions by legislation under certain conditions. A draft Bill was approved by the Conference and eventually passed into law as the Copyright Act of 1911 (1 & 2 Geo. V. c 46) giving the legislatures of British Possessions the powers referred to above and providing that any alteration of substance will apply only to works the authors of which were at the time of making the work resident in the Possession and to works first published in the Possession.

The Government of India consider that the introduction of the English Act into India is desirable and pressing both for imperial and international as well as for domestic reasons (1).

In view of the unanimous recommendation of the Imperial Copyright Conference, which laid the greatest stress on the need for uniformity throughout the Empire, it is desirable, that the provisions of the English Act should be generally adopted. These provisions make a great advance on the Indian Copyright Act of 1847 on account of the inclusion of a large number of subjects outside books in which Copyright can subsist and may perhaps be in advance of the requirements of this country ; but apart from certain provisions in regard to mechanical instruments and Government publications there is no substantial difference in the subjects of Copyright between the English Act of 1911 and the Bill of 1913 to amend the Indian Copyright Act.

Two important
alterations.

We should notice here two important alterations of principle which have resulted through the ratification of the Berlin Convention but which had no previous existence in either English or Indian legislation. In the first place,

(1) See the *Letter from the Secretary to the Government of India* (Department of education) to the *Secretary to the Government of Bengal* (General [educational] Department), No. 1820 dated Simla, August 1, 1912.

there is the abolition of all formalities of registration in respect of Copyright. The convention is based on this principle. The Gorell Committee strongly condemned these formalities, most nations have abolished them. Secondly, the term of Copyright has been changed subject to certain provisos from 42 years prescribed in §1 of the Indian Copyright Act of 1847 to one of life and 50 years

LEC VII.

Abolition of formalities of registration

Term of Copyright changed to life and 50 years

Passing of an Act based on the recommendations of the Gorell Committee will give India an Act the provisions of which will be applicable not only to whole of British India but to the whole of British Empire and to a large portion of the civilized world.

The first Patent law in India was the Act of 1856, but as it was not sanctioned by the Home Government, there was no effective law until the Act of 1859 (XV of 1859) for granting exclusive privileges to inventors. That Act was based on the British Act of 1852 and continued until June 30th, 1888. Act V of 1888 came into force on the following day, and has been repealed by the Indian Patents and Designs Act, 1911 (II of 1911). Just as the Act of 1888 followed the lead given by the British Act of 1883, so the present Act is a sequel to the modifications in the law made by the Patents and Designs Act passed in 1907 in the United Kingdom.

Indian Patents and Designs Act

The registration of designs, which was also effected under the Act of 1888, has a shorter history as it only dates back to the *Patterns and Designs Protection Act* (XIII of 1872). Owing to the high fees no great advantage was taken of the provisions of the law for safeguarding proprietorship in designs. Sec 77 of the present Indian Patents and Designs Act (II of 1911) confers power, on the Governor-General in Council, to make rules for certain purposes; and all rules made under this section and published in the *Gazette of India* have effect as if enacted in this Act.

The Indian Contract Act (IX of 1872) forms part of the scheme of passing a Code of substantive law for India. The Indian Contract Bill was originally drafted by the Third Indian Law Commission in England and was sent to the Government of India by the Secretary of State for India. On the receipt of this draft the Government of India sent it to different Local Governments and Administrations for their opinion. That draft had been before all the Local Governments and opinions had been expressed upon it by all classes of officers and judges, European and Indian, throughout the Empire. It had been before not less

Substantive.
II Private
(c) Contract.

LÆC. VII.

(c) Contract.

than three Committees of the Legislative Council of the Governor-General of India. Its contents had formed the subject of protracted discussion between the Government of India and the Secretary of State. Two Legal Members of the Council had it before them, with the advice and assistance of two Secretaries to the Legislative Department ; and it had been scrutinized in every detail with the most minute care, by several of the most eminent merchants of Calcutta. The Bill as submitted before the Legislative Council was substantially the same as drafted by the Law Commissioners in England, though it had been to some extent, altered in substance and also to a certain extent in form and arrangement. But there were differences of opinion between the Legislative Council in India and the Indian Law Commissioners in England on two main questions (a) whether all penalties should be treated as liquidated damages and (b) whether ownership of goods might be acquired by buying them from any person who was in possession of them, if the buyer acts in good faith, and under circumstances which did not raise a presumption that the possessor had no right to sell them or in other words, that every place in India should become a market-overt. There was prolonged discussion between the Government of India and the Secretary of State. The final result was that the Secretary of State left the Government of India to deal with the matters under discussion as they thought proper. Then the Law Commissioners resigned. The Bill was then carried through the Council with some important amendments by Sir James Stephen (1)

The Indian Contract Act does not profess to be a complete code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of the law (2). This Act consists of eleven (11) chapters only which deal with the following subjects :— (i) Contract in general under several heads ; (ii) the Contract of the Sale of goods ; (iii) the Contract of Indemnity and Guarantee ; (iv) the Contract of Bailment ; (v) the Contract of Agency ; and (vi) the Contract of Partnership.

These contracts were chosen to form the subject of the Act, because they are of the commonest occurrence. If an attempt had been made to include within this Act pro-

(1) *Gazette of India. Supplement.* May 4, 1872, p 528 For the merits and defects of the Act see Stokes' *Anglo-Indian Codes.* Vol. I. p 534.

(2) *The Indian Contract Act. Preamble.*

visions as to every kind of contract on which legal decisions have been given, the Act would have been of most unwieldy dimensions, and would have contained a good deal of matter which would probably have been of very little practical use to Judges or suitors. The framers of the Indian Contract Act carefully considered the provisions of the Draft New York Civil Code (on the subject of obligation) and adopted several of its provisions, but they have also omitted several principal matters contained in that Code. The principal matters omitted are.—Shipping Contracts. Trusteeship ; Insurance ; Contracts by Carriers ; Mortgage ; Bills of Exchange and the whole subject of Relief. It was thought desirable not to deal with shipping contracts, because the persons connected with them in India were very few and it was thought desirable that their contracts should be regulated by the law of England. The subject of Trusteeship has not been dealt with because the English law on that subject is unsuitable to any country except England and countries where the population is of English descent (1). The law relating to Bills of Exchange has been omitted, because a bill on that subject was framed by the Law Commissioners and was laid aside as unsuitable both to English merchants, who naturally wished to follow the law of England, and to Native merchants, who had customs of their own about *hundis*, which it was not desirable to interfere with (2). The subject of Relief had been left out because it was thought desirable that it should be dealt with in a separate Act (3). The law of Mortgage had been otherwise provided for (4). “As to the Law of Insurance” said Sir James Stephen (5) “I have doubts whether it is a matter of much importance out of the Presidency towns, but a Bill on the subject was framed by the Indian Law Commissioners, and can be taken up if it is thought desirable.” Nothing was done in this matter till the year 1912 when the Indian Life Assurance Companies Act (VI of 1912) was passed. As to Carriers, it was thought desirable that the subject should be dealt with by a separate Act. Immediately on the passing of the Indian Contract

The Indian
Contract Act

Stephen.

(1) Then the *Indian Trust Act* (II of 1882) has been passed but this Act is not applicable to the whole of British India. See also *Trustees & Mortgagees Powers Act* (XXVIII of 1866) and the *Indian Trustees Act* (XXVII of 1866).

(2) Now see the *Negotiable Instruments Act* (XXVI of 1881).

(3) Now see the *Specific Relief Act*. (I of 1877).

(4) Now see *Transfer of Property Act*. (IV of 1882) ch. IV §§58-99 and *Code of Civil Procedure* (V of 1908) Ord. XXXIV.

(5) *Supplement to the Gazette of India*. May 4, 1872 p. 534.

L.R.C. VII.

Act, and at the very same sitting of the Council, Sir James Stephen obtained leave to introduce a Bill to amend the law relating to Carriers. For some reason or other (probably because Sir James Stephen left India a few days later) no further proceedings were taken in that direction (1).

"It will appear" said Sir James Stephen (2) in moving that the Report of the Select Committee on the Indian Contract Bill be taken into consideration, "that though incomplete, the Bill will probably suffice for considerable time for the wants of the country. I may add, however, that as its deficiencies are discovered, it will be easy to enact supplementary chapters which may be read as part of it"

Pollock.

Referring to the borrowing of provisions from the New York Civil Code, Sir F. Pollock remarks (3) "Another source of unequal workmanship, and sometimes of positive error, is that the framers of the Indian Codes, and of the Contract Act in particular, were tempted to borrow a section here and a section there from the draft Civil Code of New York, an infliction which the sounder lawyers of that State have been happily successful so far in averting from its citizens. This Code is in our opinion, and we believe in that of most competent lawyers who have examined it, about the worst piece of codification ever produced . . . The clauses on fraud and misrepresentation in contracts—which are rather worse, if anything, than the average badness of the whole—were most unfortunately adopted in the Indian Contract Act. Whenever this Act is revised everything taken from Mr. Dudley Field's Code should be struck out, and the sections carefully recast after independent examination of the best authorities" Referring to the unequal workmanship as manifested in the Indian Contract Act, Sir F. Pollock remarks (4) "In fact, the Contract Act passed through not less than three distinct stages. First, there was the draft prepared in England by the Indian Law Commission, uniform in style and possessing great merit as an elementary statement of the combined effect of common law and equity doctrine as understood about forty years ago. . . Next, this was revised and in parts elaborated by the Legislative Depart-

(1) *Moothora v. I. G. S. N. Coy.* (1883) 10C. 166, 193.

(2) *Supplement to the Gazette of India.* May 4, 1872 p. 535.

(3) Pollock's *Indian Contract Act.* Preface to the first edition. See also Sir F. Pollock's *Tagore Law Lectures* 1801. *The Law of Fraud, Misrepresentation and Mistake in British India* pp 20, 95, 99 and 122.

(4) *The Indian Contract Act.* 1st Ed. Preface.

ment in India. The borrowing from the New York draft LEC. VII. Code seems to belong to this phase. Lastly, Sir James Stephen made or supervised the final revision, and added the introductory definitions, which are in a wholly different style and not altogether in harmony with the body of the work. Evidently this process could not satisfy the conditions of a model code. It is much to the credit of the workmen that the result, after allowing for all drawbacks, was a generally sound and useful one."

"The Act only lays down" says Sir Richard Garth C J. (1) "certain general rules, which, in the absence of any special contract, or usage to the contrary, are binding on contracting parties. But it could never have been intended to restrain free liberty of contract as between man and man, or to invalidate usages or customs which may prevail in any particular trade or business. These customs and usages have only the effect of introducing special terms into all contracts or dealings in any particular trade; their very object is generally to modify or control the general law, and the Contract Act in my opinion could never have intended to invalidate all customs or usages which are not in accordance with the general rules which it enacts, or to prevent private persons from entering into contracts which are inconsistent with those rules."

Scope of the Contract Act. (IX of 1872).

Since the passing of the Indian Contract Act its provisions have been affected only by 4 Acts, viz :— Contract Act. Its merit.

- (i) Act I of 1877 (Specific Relief Act).
- (ii) Act IV of 1886 (The Indian Contract Act Amendment Act 1886).
- (iii) Act XII of 1891 (The Amending Act of 1891).
- (iv) Act VI of 1899 (The Indian Contract Act Amendment Act).

Of these only two viz Act IV of 1886 and Act VI of 1899 are important. Act IV of 1886 substituted a new section for section 265 of the original Contract Act. Act VI of 1899 substituted a new section for section 16 of the Contract Act and amended sections 19 and 74 and added a new section 19A. Act XII of 1891 made only 3 verbal alterations. Thus we see that within the last forty years only five sections have been amended and one of these sections deals with the much discussed and important question of liquidated damages.

It has been already stated that the Indian Contract Act is only a partial measure and I shall mention here the other

(1) *Moothora v. I. G. S. N. Co.* (1883) 10C. 166, 185.

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Other Acts which contain provisions of the law of contract.

Acts which contain some provisions of the law of contract in British India :—

(I) *Transfer of Property Act* (IV of 1882) codified the rules relating to the assignment by operation of law of obligations on the transfer of land, to sale, mortgage and lease of immovables, to exchange and gift of every kind of property and to the assignment of contractual rights not comprised in the *Negotiable Instruments Act* (XXVI of 1881).

(II) *The Negotiable Instruments Act* (XXVI of 1881) codified the rules relating to the assignment of contractual rights, not comprised in the *Transfer of Property Act*.

(III) *Contract with carriers.*

(a) By land *The Carriers Act*, 1865 (III of 1865) as amended by Act IX of 1890 and X of 1899 §2 *The Indian Railways Act.* (IX of 1890) as amended by Act IX of 1896 and supplemented by Act IV of 1905.

(b) By sea—*The Indian Bills of Lading Act* (IX of 1856)

Bottomry and Respondentia—Law of these subjects has not yet been codified for the reason mentioned above

(IV) *Master and servant* The general law on this subject is still uncodified. The draft Bill by Dr Stokes was not passed because of the public opposition to it on the ground that its penal clauses were very objectionable. But we have got some special Acts regulating the relation between masters and servants, to some extent e.g. *The Workman's Breach of Contract Act* (XIII of 1859); *the Employers and Workmen (Disputes) Act.* (IX of 1860); *the Stage-Carriages Act* (XVI of 1861) §§8, 13; *the Assam Labour and Emigration Act.* (VI of 1901) *The Indian Merchant Shipping Act* (I of 1859) §§55-58 provide summary remedies for recovery of wages by shipmasters and seamen.

(V) *Master and Apprentice.* The law on this subject is to be found in different Acts, e.g. *The Apprentices Act* (XIX of 1850) amended by Act XII of 1891. *The Indian Merchant Shipping Act* (I of 1859) contains special provisions as to apprentices to sea-service.

(VI) *Professional service* :—It is only the profession of lawyers in this country that has got Acts for its guidance. There is no Act like the English Medical Act (21 & 22 Vic. c.90) for the guidance of the Medical profession in this

country The important enactments relating to the Legal Profession are . — Lec. VII.

- (a) Bom. Reg II of 1827 §§47-54, 56 (Pleaders, Bombay Presidency). (c) Contract.
- (b) Act I of 1846 (Pleaders &c Bombay and Madras Presidencies).
- (c) Act XX of 1853 (Pleaders &c Bombay and Madras Presidencies).
- (d) Bom Act XII of 1866 §§16, 17 (Courts, Sindh).
- (e) Reg I of 1877 §27 (Courts, Ajmere).
- (f) Reg II of 1877 §118 (Revenue Agents, Ajmere)
- (g) Act XVIII of 1879 (Legal Practitioners, Assam, Bengal, etc).
- (h) Act IX of 1884 (The Legal Practitioners Act).
- (i) Reg I of 1894 §3 (Laws, Angul)
- (j) Reg. I of 1896 §§25—29, 38 (Civil Courts, Upper Burma).
- (k) Reg IX of 1896 §90 (d) (Civil Justice, British Beluchistan).
- (l) Act V of 1898 §557 (Crim Pro Code).
- (m) Act VI of 1900 §40 (Lower Burma Courts).
- (n) Reg VII of 1901 §§5, 9 (Laws, N. W Frontier Province).
- (o) Act V of 1908 §119 (Civil Procedure).

It is clear that the law on this subject requires consolidation

(VII) *Insurance*. Though the Third Indian Law Commission drafted a code of Law of Insurance nothing was done in the matter for a long time Sections 5 and 6 of Act III of 1874 (Married Women's Property Act) only provide that husband and wife may effect policy of Insurance for the benefit of each other. There is no Act relating to Fire and Marine Insurance and it was only in 1912 that the Indian Life Assurance Companies Act (VI of 1912) was passed

(VIII) *Trust* "There is, probably, no country in the world where fiduciary relations exhibit themselves so extensively, and in such varied forms, as in India. And possession of dominion over property, coupled with the obligation to use it, either wholly or partially for the benefit of others than the possessor, is, I imagine, familiar to every Hindu" (1) Trusts in the comprehensive sense of the word, that is to say, obligations relating to property, which arise out of a confidence reposed in and accepted by

(1) *Tagore v. Tagore* (1869) 4 B. L. R. O. C. J. 134. *per* Phear J.

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one person for the benefit of another are often created by the people of this country and are frequently enforced by the British Indian Courts. But trusts in the strict sense of the word, and in the sense in which it is used by English lawyers, i.e., confidences to the existence of which a 'legal' and an 'equitable' estate are necessary, are unknown to Hindu and Mahomedan law. *The Indian Trusts Act* (II of 1882) codifies the law relating to trusts in the comprehensive sense mentioned above but it saves the Mahomedan law as to *wakf*, as also the religious and charitable endowments established by Hindus and Buddhists.

With few exceptions the rules contained in this Act are substantially those administered by English Courts of Equity and (under the name of 'justice, equity and good conscience') by the British Indian Courts.

Besides the Indian Trusts Act there are the following Acts on this subject:—(a) Religious Endowments Act (XX of 1863). (b) Charitable Endowments Act (VI of 1890) (c) The Societies Registration (XXI of 1860) (d) The Official Trustees Act (II of 1913) (e) The Indian Trustees Act (XXVII of 1866). (f) The 'Trustees' and Mortgagees' Powers Act (XXVIII of 1860) (g) The Religious Societies Act (I of 1880). Most of these Acts are not applicable to the Hindus, Mahomedans, or Buddhists, or to any person whom the Governor-General in Council may exclude from the operation of this Act.

Attempts should be made for consolidating all these different Acts. Section 92 of the Civil Procedure Code (V of 1908) deals with the procedure in suits relating to public charities.

The marriage laws of the Hindus and Mahomedans have not been codified by the Anglo-Indian Legislature and the rules of *Shastras* and *Koran* still govern the relation between husband and wife. The only Acts which touch the marital relations of Hindus are:—(1) *Hindu Widows Re-marriage Act* (XV of 1856) and (2) *the Criminal Law Amendment Act*, 1891 (X of 1891).

The marriage law of the Christians has been partially codified by the following Acts:—

Substantive.
Private.
(d) Family
relations.

1. Marriage.

- (i) The Indian Christian Marriage Act (XV of 1872) with subsequent amending Acts.
- (ii) The Native Converts Marriage Dissolution Act (XXI of 1866).
- (iii) The Indian Divorce Act (IV of 1869).
- (iv) Dower Act (XXIX of 1839).

(v) Married Women's Property Act (III of 1874). LEC. VII.

(vi) Validation of Marriage of Christians Acts (II of 1891 ; II of 1892, XVII of 1895)

Other legislative enactments on this subject are —

(a) Marriage of persons other than Christians, Parsis Hindus &c. (III of 1872)

(b) Marriage of Parsis (XV of 1865).

(c) Marriage of Convicts, Andamans (Reg III of 1876 §28).

(d) Marriage of Malabar Hindus (Mad. Act IV of 1896).

(e) The Kazis Act (XII of 1880).

(f) The Births, Deaths and Marriages Registration Act (VI of 1886).

(g) Indian Foreign Marriages Act (XIV of 1903)

(h) Anand Marriage Act (VII of 1909).

(i) Merchant Shipping Act (I of 1859) §105 (8) enacts that entry should be made in the official log book of every marriage taking place on board with the names and ages of the parties.

(d) Family
relations

(i) Marriage.

For codification of Marriage law of Hindus and Mahomedans see Lecture XII.

Marriage law of the Christians, now to be gathered from different Statutes and Acts, should be consolidated and codified, and the provisions of English Statutes, already applicable to India (1) should be embodied in it.

An important point of marriage law was raised in the case of *Chetti v. Chetti* (2) in which the question of validity of a marriage between a Hindu and a non-Hindu in England, was decided not according to the rules of Hindu Law, according to which marriage is a sacrament and not a contract, but according to rules of law according to which marriage is a contract.

The Civil Marriage Bill of the Hon'ble Mr B. N. Bose, rejected by the Legislative Council of the Governor-General of India, involved the important principle of changing personal law without changing religion. Such a Bill allows a Hindu or Mahomedan to marry, not according to the rules of his personal law of marriage, but according to statutory rules. Validity of such a marriage, involving questions of legitimacy and succession of the children of the marriage, will depend solely on the provisions of the Statute. Such

(1) 42 & 43 Vic. c 29 ; 55 & 56 Vic c 23 , 6 Ed. VII c 30 ; 6 Ed VII c. 40.

(2) (1909) P. 67. See Lec. XII.

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an Act, introducing, as it will do, the principle of change of personal law without change of religion, will be inconsistent with Hindu Law. But on the other hand, it has its advantages. Passing of such an Act will prepare the way for an Act which will enable a person to change his personal law of Succession etc. without change of creed.

2. Parent & child.

Parent and Child The law on this subject has not been codified and the Anglo-India Legislatures have left this branch of personal laws of Hindus and Mahomedans untouched. But so far as the subject of guardianship is concerned it has been regulated to some extent by :—

(a) Guardians and Wards Act (VIII of 1890).

(b) Court of Wards Acts.

(c) Marriage of Hindu Widows Act (XV of 1856) §3.

3. Guardianship.

The *Guardians and Wards Act* is a Code defining the rights and remedies of Wards and Guardians. It consolidates and amends the law relating to Guardians and Wards and all questions touching the relations of guardians and wards are to be disposed of by proceedings under the provisions of this Act only (1) Section 3 of the *Hindu Widows Remarriage Act* (XV of 1856) deprives of a Hindu widow of her preferential right to act as a guardian of her children by her first marriage, but it does not compel the Court to remove her from such guardianship. The Court under that section has a discretion to remove a Hindu mother from the office of guardian of the children of her first marriage when she has remarried. But the exercise of such discretion must be regulated from the point of view of the welfare of the infant. This section (§3) is not applicable to cases where re-marriage is recognised by the caste to which the widow belongs (2) "The Legislature recognises that such re-marriage not only does not operate as a physical death of the widow, but it does not operate even as a civil death for all purposes. Under such circumstances, it is impossible for us to hold that the Court may not appoint the mother as guardian of her children by her first marriage notwithstanding the provisions of §3 of the Hindu Widows Remarriage Act. The only effect of the section is that the preferential right to the appointment she would otherwise have is destroyed, and if she is appointed, she must be appointed as a stranger, in other words, the Court has a discretion in the matter, though ordinarily, unless good cause

(1) *Sham Lal v Bindo* (1904) 26 A. 594, 597. See also *Mahadeo v Bindeshri*. (1908) 30 A. 137, 139

(2) *Gunga Pershad v Jhalo* (1911) 15 C. W. N. 579, 583, 584.

was shewn to the contrary, the Court would appoint a relation as guardian under §3 in the place of the mother." I.E.C. VII.

To protect the persons and properties of minor proprietors of land, (outside the Presidency towns) power has been given to the Revenue authorities, under the name of Courts of Wards. The State being the guardian of all its minor subjects may delegate its guardianship to such of its tribunals as it deems fit and by the different Courts of Wards Regulation and Acts it had delegated this right to the different Courts of Wards. But "in Bengal the Court of Wards was originally established more for the purpose of ensuring the collection of the revenue than for that of protecting minor proprietors" (1). We are not concerned here with the history, constitution and power of the different Courts of Wards (2) but only with the question how far the law on this subject has been codified and whether there can be a Consolidating Act on this subject. The enactments relating to this subject are.—

- (a) Beng Reg. V of 1799 §8 (Administration)
- (b) Beng Act IX of 1879 with subsequent amending Acts (Court of Wards, Assam and Bengal).
- (c) Reg I of 1888 (Government Wards, Ajmere)
- (d) Act XXIV of 1899 (Court of Wards, Central Provinces).
- (e) U P. Act III of 1899 (Court of Wards, United Provinces).
- (f) Mad Act I of 1902 (Court of Wards, Madras; repealing Mad. Regs V of 1804 and X of 1831).
- (g) U. P. Act I of 1903 §6 (Incumbered Estates, Bundelkhand)
- (h) Punj. Act II of 1903 (Court of Wards, Punjab)
- (i) Reg V. of 1904 (Court of Wards, N.-W. Frontier Province).
- (j) Bom Act I of 1905 (Court of Wards, Bombay)

Now, is it possible to have all these Acts consolidated?

In Bengal *The Bengal Wards' Manual* contains the different Acts relating to Wards Estates [Seven in number viz. Act XXXV of 1858, IX of 1875, IV of 1892; IX of 1879 (B.C.); III of 1881 (B.C.); I of 1906 (B.C.); II of 1909 (B.C.)] and the Rules framed by the Board of Revenue under those Acts and also under Act VIII of 1890.

(1) Markby's "Lectures on Indian Law" p. 65.

(2) For the history of Courts of Wards and their constitution see Trevelyan on *Minors* 4th Ed chs XXX—XXXVI.

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(d) Family relations (contd.).

This manual also contains the different enactments relating to attached Estates and Encumbered Estates. Before deciding the question it is to be decided whether all these different enactments may be consolidated. Other Provinces also have their Manuals and they should also be examined before deciding the general question of consolidation of the different enactments relating to Wards' estates. The first step to be taken is to attempt the consolidation of the law in each Province.

(1) Succession and Inheritance.

Substantive law of succession of the Hindus and Mahomedans has not been touched by the Anglo-Indian legislators. Various enactments (1) laid down the rule that in all suits regarding inheritance, marriage etc. the laws of Koran with respect to Mahomedans and those of the *Shastras* with respect to *Gentoos* should be invariably adhered to and the Anglo-Indian Legislators have scrupulously adhered to that principle and it is only the adjective or procedural portion of this branch of law that has been dealt with by the British Indian Legislatures and it has been codified to some extent. In this Lecture I shall only enumerate the different enactments on this subject and in subsequent lectures shall show how far they have touched Hindu and Mahomedan Law and how far it is feasible to codify the Substantive portion of Hindu and Mahomedan law.

Now, the first enactment on this subject is Regulation Reg. XI of 1793 §1 XI of 1793. It was followed by Reg. V of 1799 and Reg. X of 1800.

Section 1 of Reg. XI of 1793 (which may be taken as the preamble) runs as follows — "A custom, originating in consideration of financial convenience, was established in these provinces under the Native Administrations, according to which some of the most extensive zemindaries are not liable to division. Upon the death of the proprietor of one of these estates, it devolves entire to the eldest son ; or next heir of the deceased, to the exclusion of all other sons or relations. This custom is repugnant both to the Hindoo and Mahomedan laws, which annex to primogeniture no exclusive right of succession to landed property. For the above reasons the Governor-General in Council has enacted the following rules". Then follows the rule (§2) which enacted that the landed property of any zemindar etc. dying after 1st July 1794 and without a will should be divided equally amongst his heirs.

(1) See Lecture VIII for these enactments.

After the passing of this Regulation it was found that in the Jungle Mehals of the Zillah of Midnapur and other districts there was a custom by which the succession to landed estates invariably devolved on a single heir without division of the property, and it was enacted by Reg. X. of 1800 that Reg. XI of 1793 would not apply to the jungle mahals of Midnapore and other districts. Reg. V of 1799 is known as "a Regulation to limit the interference of the Zillah and City Courts of Dewanny Adawlut in the execution of Wills and Administration of the Estates of persons dying intestate" But most of its provisions have been modified by subsequent legislation on the subject.

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Bengal.

Reg. X of 1800.

Bombay Reg VIII of 1827 provides for the formal recognition of heirs, executors and administrators, and for the appointment of administrators and managers of property by the Courts.

Bombay

Madras Reg V of 1829 (§4) enacts that wills left by Hindus, subject to the Government of Madras, should have no legal force whatever except so far as their contents may be in conformity with the provisions of Hindu Law according to the authorities prevalent in that Presidency.

Madras

In 1842 "The Succession (Property Protection) Act," 1841 (XIX of 1841) was passed and it provides for the protection of moveable and immovable property against wrongful possession in cases of succession. In this Act no notice was taken of the Bombay Regulation VIII of 1827 which therefore continued to be applicable concurrently with it in Bombay Presidency.

Act XIX of 1841.

In the meantime it was decided to place a complete probate system within reach of the bulk of the population in this country. But it was found impossible to have such a code applicable to the whole population of India. Then came the Indian Succession Act (X of 1865). It is the first part of the body of substantive law framed for India by the Third Indian Law Commission appointed for that purpose. It comprises the law of succession and inheritance generally applicable to all classes domiciled in British India, other than the Hindus, Mahomedans and Buddhists, each of which portions of the population has laws of its own on the subject. The law of England on this subject has been used as the basis of this Act, but the Commissioners have deviated from that law (as it then stood) in some instances, of which the following are of importance:—(a) The distinction between devolution of moveable and that of immovable property which existed in England before the passing of the Land

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Indian
Succession Act.

Transfer Act, 1897 (1), has been abolished. All rights, as under the Roman Law, devolve *ab intestato* agreeably to a uniform and coherent scheme. (b) The Indian Succession Act also provides that no person is, by marriage, to acquire any interest in the property of the person whom he or she marries or to become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. This rule abolishes the husband's interest as tenant by courtesy, the wife's as tenant by dower. In case of intestacy the widow has the same rights in respect of all the property of her husband as a widow has in England in respect of her husband's personal property (2).

It can be said, with pardonable pride, by the Anglo-Indian Legislators that they *do* sometimes lead the British legislators.

Following the example of Lord Macaulay the Third Law Commission made copious use of *illustrations* (mostly taken from the English Equity Reports). These *illustrations* obviate many questions of construction and do much to fix the sense of the law, they, at all events, get rid of the objections which might justly be made to a code composed exclusively of abstract propositions. The Commissioners observed "The operation of judicial decisions in making law precise is a natural process, and that process is adopted and improved in the use of illustrations. Law framed in the way in which we have endeavoured to frame it also consists of rules and principles combined with decided cases, but with this difference, that the decisions are not made by Judges in trying causes, but by the legislature itself in enacting the law; and though they are an important part of the law, settling points which without them would have been left to be determined by the Judges, yet are strictly confined to the function of guiding the judges in their future decisions, and of explaining in what manner the definitions and rules to which they are annexed are to be interpreted and applied."

The Indian Succession Act neatly codified, for the bene-

(1) Under the *Land Transfer Act* 1897 (60 & 61 Vic. c. 65) a man's real estate devolves upon his executors or administrators in the same manner as a chattel real, and may be sold by them to satisfy his debts. Williams on *Real Property* 20th Ed. p. 29.

(2) In England the capacity of wives with regard to property has been completely altered by the *Married Women's Property Act* (45 & 46 Vic. c. 75) which came into operation on the 1st January 1883. Every woman married after the commencement of the Act is entitled to hold and dispose of, as her separate property, all real and personal property which belonged to her at the time of her marriage, or shall be acquired by or devolve upon her after marriage. Williams on *Real Property*, 20th Ed. p. 310.

fit only of Europeans domiciled in India, Indian Christians etc. so much of English succession law and the connected procedure as seemed adapted to their requirements, thus superseding the practice under the ecclesiastical side of the High Court (1)

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The Hindu Wills Act (XXI of 1870) extended to Hindus dying or leaving properties within certain parts of British India those sections of the Succession Act which deal with the mode of executing, proving and giving effect to wills. This restricted experiment of making some of the sections of the Indian Succession Act applicable to Hindus residing in certain parts of British India was followed up by a much larger measure, the Probate and Administration Act (V of 1881), but it was left to the several Local Governments to put the most important provisions of the Act in force or not at their discretion ; and "it was not until 1887 that its operation became territorially almost co-extensive with British India "

Hindu Wills Act.

Act VII of 1901 placed the Indian Christians in the same position as Hindus and Mahomedans in the matter of obtaining letters of administration, and certificates under Succession Certificate Act 1889.

The Succession Certificate Act (VII of 1889) which repeals earlier Acts on the same subject, facilitates the collection of debts on succession and afford protection to parties paying debts to the representatives of deceased persons

Besides the above mentioned Acts there is the *Administrator General's Act* (III of 1913) a portion of which applies to Hindus and Mahomedans as well as to Europeans when the deceased has left assets within a Presidency town.

The Administrator General's Act (II of 1874) had been amended by Acts IX of 1881, II of 1890 and V of 1902, and also §4 of Act VII of 1901, but all these Acts have been repealed by Act III of 1913 which consolidates the law on this subject.

To sum up the statutory provisions on this branch of law are to be found in. —

- (a) The Bengal Inheritance Regulation (Reg. XI of 1793).
- (b) The Bengal Wills and Intestacy Regulation (Reg. V of 1799).
- (c) The Bengal Inheritance Regulation (Reg. X of 1800).

(1) See Wilson's *Digest of Anglo-Mahomedan Law*. 3rd Ed. p. 229.

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- (d) Administration of Estates (Bom. Reg VIII of 1827).
- (e) The Madras Hindu Wills Regulation (Mad Reg. V of 1829).
- (f) The Succession (Property Protection) Act (XIX of 1841).
- (g) The Indian Succession Act (X of 1865)
- (h) Hindu Wills Act (XXI of 1870).
- (i) The Administrator General's Act (III of 1913)
- (j) The Probate and Administration Act (V of 1881 with amending Acts).
- (k) The Succession Certificate Act (VII of 1889).
- (l) The Native Christian Administration of Estates Act (VII of 1901).
- (m) The Civil Procedure Code (V of 1908) §§50, 52 ord. XXXI and forms 41—44.

(e) Relief.

Specific Relief Act

Now, we have done with the subject of codification of substantive law in this country. But before dealing with the Codes of Adjective Law, we shall notice here the code which contains the law of Relief, because law of Relief occupies a middle ground between substantive law and procedure. The Specific Relief Act (I of 1877), the only codifying Act passed during the tenure of office by Lord Hobhouse as the Law Member, contains the law on this subject.

(C) Adjective Law.

Under the head Procedure, are included all the laws which regulate the proceedings and powers of Courts of Justice, and the assessment and collection of land revenue. As to the Courts of Justice, we have the two Codes of Civil and Criminal Procedure, the Evidence Act and the Limitation Act.

Civil Courts Acts.

One branch of the law of Civil Procedure has been reduced to a shape simple indeed, but not so simple as we could wish. The Civil Courts of each province are regulated by the Civil Courts Acts, each of which replaces a great number of isolated and scattered provisions.

Revenue Procedure.

So far as Revenue Law is concerned (1) it is different in different parts of the country and there are about 112 enactments on this subject.

Bengal.

In Bengal there are several old Regulations and the earliest one is the celebrated Land-Revenue Regulation of 1793 (II of 1793). Then there is the Bengal Land-Revenue Sales Act, 1841 besides several other Acts.

(1) See Lecture VIII under heading "Revenue Procedure."

Other Provincial Land-Revenue Acts are.—

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- (a) Bom. Act XII of 1876 (Bombay Land Revenue Act).
- (b) Bom. Act V of 1879 (Land Revenue Code, Bombay)
- (c) Act XVIII of 1881 (Land Revenue Act, Central Other Provinces Provinces).
- (d) Act XVI of 1889 (Land Revenue Act, Central Provinces).
- (e) Act XVII of 1887 (Land Revenue Act, Punjab)
- (f) U P Act III of 1904 (The United Provinces Land Revenue Act).
- (g) Act II of 1864 as amended by Mad. Acts III of 1884 ; I of 1897 ; I of 1909 and repealed in part by Act XII of 1873 (Madras Revenue Recovery Act).

Testamentary Jurisdiction. Procedure in such cases is governed by the provisions of the *Indian Succession Act*, the *Probate and Administration Act*, and the *Legal Representatives Suits Act* (Act XII of 1855)

Though the sections relating to probate in the Probate and Administration Act are substantially taken from the corresponding sections in the Succession Act, it must be observed that the last-mentioned Act, which to a large extent embodies the rules of the English law, departed in many particulars from those rules, and was not only made applicable to persons of European descent, or those to whom the system derived from the Ecclesiastical Courts might naturally be applied, but was made the law for all persons in British India other than Hindus, Mahomedans and Buddhists, including for instance the Parsees

Procedure in
Testamentary
Succession and
Administration
of Intestate
E-states

“Testamentary jurisdiction was first given to the Supreme Court by their original Charters, that in Bengal dated in 1774 being the first. And it was then given as a branch of ecclesiastical jurisdiction, and was to be administered according to the ecclesiastical law as in force in the Diocese of London. In the course of the series of events by which the British territories in India grew from a group of trading settlements into an empire, various branches of jurisdiction which sprang originally from an ecclesiastical origin, have come to be applied by a number of legislative Acts to new territories and new classes of persons, and administered by new tribunals. And in the progress of this development the ecclesiastical origin of such jurisdiction has been completely discarded, and the legislature has gradually evolved

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an independent system of its own, largely suggested, no doubt, by English law, but also differing much from that law, and purporting to be a self-contained system. Even in the case of the High Courts, the successors of the Supreme Courts (which alone possessed ecclesiastical jurisdiction) the testamentary jurisdiction which the charters purport to confer upon them is not given as a branch of ecclesiastical jurisdiction, and is not made dependent upon the law administered by English Courts.

“From an early date the Supreme Courts granted probates of Hindu and Mahomedan Wills (1). The practice varied greatly from time to time, and it was never perhaps very satisfactorily determined upon what basis the jurisdiction rested. It was, however, established that such probates might issue. But the Supreme Courts never applied the English rule as to the necessity for probate to Hindu or Mahomedan Wills, nor did they attribute to such probates when granted the English doctrines as to the operation of probate. Under that system a Hindu or Mahomedan executor took no title to property merely as such by virtue of the probate” (2)

The personal laws of the Hindus and Mahomedans, as noticed before, have been left untouched by the British-Indian Legislatures and so far as they are concerned, except the procedure in the *Civil Procedure Code* in suits for restitution of conjugal rights, there is no enactment on this subject. The provisions of the *Indian Divorce Act* (IV of 1869) apply only to Christians. The provisions of the *Civil Procedure Code* also apply to such cases, to a certain extent.

“Such is the relation” says Lord Macaulay (3) “which exists between the different parts of the law, that no part can be brought to perfection while the other parts remain rude”.

The main reasons assigned by Livingston (4) for supplementing the Penal Code by Criminal Procedure Code are —

(a) Without a Code of Criminal Procedure, expense, delay or uncertainty in applying the best laws for the prevention and punishment of offences would render the provisions of the Penal Code useless or oppressive.

(1) *Bebee Muttra's case* (1832) Morton. 75. See also Ap C

(2) *Mirza Kurratulain v Nawab Nuzhat-ud-Dowla* (1905) 32 I. A. 244, 257, 258 (S. C.) 9 C W N. 938, 950.

(3) *Letter to Lord Auckland*, Dated, 14th October, 1837 §4.

(4) Livingston's *Introductory report to the Code of Procedure prepared for the State of Louisiana* Livingston's Works Vol. I p. 331. Whitley Stokes' *Anglo-Indian Codes*. Vol II. p. 1.

Procedure in
Divorce and
Matrimonial
Causes.

Criminal
Procedure.

(b) The law relating to Criminal Procedure is more constantly used, and affects a greater number of persons, than any other law. The offender and the person injured are, as a rule, the only persons immediately affected by the commission and punishment of a crime. But in the measures prescribed for preventing crimes and prosecuting criminals any one, however unconnected with a given offence, may find himself involved. Moreover, private persons, in this country are liable to serve in trying cases as jurors or assessors

LEC. VII.

Criminal
Procedure.

For these reasons says Dr. Whitley Stokes (1) the Government of India laboured long and zealously to produce a Code of Criminal Procedure which should be easily understood, cheap, expeditious and just. On the 20th March, 1847, the President in Council asked the Indian Law Commissioners to prepare a Code containing pleading and procedure with forms of indictment adapted to the provisions of the Penal Code. Such a scheme was prepared by Messrs. Cameron and Elliott. This scheme was examined and considered by the Second Indian Law Commission and then the members of that Commission produced a draft Criminal Procedure Code which was presented to Parliament in 1856, and was in the following year introduced into the Legislative Council by Sir Barnes Peacock. It was passed by the Legislative Council as Act XXV of 1861. This Code of 1861 which came into force on 1st January 1862, applied in the first instance only to the territories subject to the general regulations, but was gradually extended to the rest of British India except the Presidency Towns. This Code was amended by 4 subsequent Acts and in 1872, the Code of 1861 together with its amending Acts was repealed and replaced by Act X of 1872. This Code, like that of 1861 was not applicable to the Chartered High Courts at Calcutta, Bombay and Madras. It was also inapplicable to the Presidency Magistrates Courts in Calcutta, Madras and Bombay.

To regulate the procedure of the High Courts in the exercise of their original criminal jurisdiction Act X of 1875 was passed which regulated the procedure also of the High Court at Allahabad and the Chief Court at Lahore.

To regulate the procedure and increase the jurisdiction of the Courts of Magistrates in the Presidency Towns, Act IV of 1877 was passed.

Thus before the passing of the Criminal Procedure Code of 1882 there were three such Codes in operation in

(1) *The Anglo-Indian Codes.* Vol II p 1.

I.R.C. VII.

British India, viz. (a) Act X of 1872 (with its amending Acts) for the Mofussil; (b) The Advocate General's (Powers) Act (X of 1875) and (c) The Presidency Magistrates Act (IV of 1877).

Criminal
Procedure

"Many provisions of these Codes merely repeated one another, many of their rules, though dealing with the same subjects, unnecessarily varied in language; and the result was that the bulk of the Indian Statute-book was far greater than it needed to be, and that the Courts when construing one Code were often deprived of the guidance of prior decision on another" (1).

The Secretary of State for India in his despatch dated 26th October 1876 to the Governor-General in Council said "I request, therefore, that your Excellency in Council will direct your attention to the question whether the Criminal Procedure Code of 1872 might not now be recast so as to combine with it the substance of the High Courts Act, 1875, and of the present measure (the Presidency Magistrates Act, IV of 1877) and thus at length to give to India a complete Code of Criminal Procedure" The task of preparing a complete Code of Criminal Procedure for British India was undertaken by Dr Whitley Stokes, to whom belongs the honor of being the draftsman of good many later day Anglo-Indian Codes The result of Dr Whitley Stokes' labour was the Criminal Procedure Code of 1882 which substituted a single Code of 568 sections for eleven enactments containing 1020 unrepealed sections After the passing of the Criminal Procedure Code of 1882 the Code was overlaid with cases and it was found necessary to amend and consolidate the law on this subject. In 1898 (V of 1898) the present Criminal Procedure Code was passed It contains a great deal of matter entirely new, added or substituted, in consequence of the conflict of rulings under the Code of 1882, or in consequence of its having been found necessary to adopt or overrule decisions under that Code, or in consequence of suggestions made as the result of experience of the working of that Code.

The present Code has been amended by XII of 1899 §3; I of 1903; XIV of 1908; IV of 1909 and several other Acts. Revision of the present Code is in contemplation for some time. "The process of repealing, amending, and supplementing the Mahomedan criminal law by enactments based on English principles went on until the Mahomedan law was wholly superseded by the Indian Penal Code in

(1) Whitley Stokes' *Anglo-Indian Codes*. Vol. II. p. 3.

1860 (1). A general Code of Criminal Procedure followed in L.E.C. VII. 1861, and the process of superseding native by European law, so far as the administration of Criminal justice is concerned was completed by the enactment of the Evidence Act of 1872" (2).

Evidence. Since the establishment of the Supreme Courts in the Presidency Towns the English rules of evidence have always been followed in those courts and several Presidency Towns. of the reforms made in England by Parliament were from time to time applied to the Supreme Courts.

The Company's Courts in Muffasil were not required to follow the English law as such but they were not debarred from following it when they regarded it as equitable. Besides a few rules expressly prescribed by the Regulations made between 1793 and 1834, there was a vague customary law of evidence, partly drawn from the Hedaya and the Mahomedan law officers; partly from English text books and the arguments of the English barristers who occasionally appeared in the Provincial Courts, partly from the lectures on law delivered since 1855 in the Presidency Towns (3).

"With regard to the admissibility of evidence in the Native Courts in *India*, we think that no strict rule can be prescribed. However highly we may value the rules of evidence as acknowledged and carried out in our own Courts, we cannot think that those rules could be applied with the same strictness to the reception of evidence before the Native Courts in the *East Indies*, where it is perfectly manifest the practitioners and the Judges have not that intimate acquaintance with the principles which govern the reception of evidence in our own tribunals; we must look to their practice, we must look to the essential justice of the case, and not hastily reject any evidence, because it may not be accordant with our own practice" (4). But these remarks were made before the passing of the Indian Evidence Act.

The few rules of law of evidence prescribed by different Bengal Regulations were distributed over several Regulations. Thus under Beng. Regulation III of 1793 §15, a Bengal Regulations as to evidence bond must be proved by two witnesses to the signature unless the consideration is proved. Rules as to witnesses corresponding generally with those contained in the present

(1) Except in Bombay, where it had been previously superseded in 1827 by a Bombay Regulation.

(2) Ilbert's *Government of India*. 2nd Ed. p. 325.

(3) See Whitley Stokes' *Anglo-Indian Codes* Vol. II p. 812.

(4) *Unide Rajaha v. Pemmasamy* (1858) 7 M.I.A. 128, 137.

L.R.C. VII.

Codes of Criminal and Civil Procedure were made by several Bengal Regulations (1).

Madras.

In Madras also rules relating to law of Evidence were generally contained in several Madras Regulations (2).

Bombay.

All the Bombay Regulations passed previously to the year 1827, with the exception of a few relating to customs and duties, were rescinded in that year, and the system of Judicature was entirely remodelled in the Code by which they were superseded; the groundwork, however, still remained the same, and the new Code was based upon the Bengal Regulation of 1793 (3). Some rules as to witnesses in civil proceedings were made by Bom. Reg IV of 1827, and rules as to witnesses in criminal proceedings were prescribed by Regs XII and XIII of 1827.

Evidence

Acts.

X of 1835.

The first Act of the Governor-General in Council dealing with the law of Evidence in British India, was Act X of 1835, which was applicable to all the courts in British India.

II of 1855.

This Act was amended and supplemented by eleven enactments within the next 20 years (4). In 1855 an Act for the further improvement of the law of evidence was introduced by Sir Lawrence Peel and carried by Sir James Colville. It afterwards became Act II of 1855. The provisions of this Act applied to all Courts in British India. Between 1855 and 1872 Civil Procedure Code of 1859 (VIII of 1859) and the Criminal Procedure Code of 1861 (XXV of 1861) were passed and these codes contained rules as to witnesses similar to those contained in the present Procedure Codes.

The fifth report of the Third Indian Law Commission contained a draft code of law of Evidence and in October 1868 it was introduced by Sir H. S. Maine and referred to a Select Committee as a Bill to define and amend the law of evidence. But it was afterwards dropped and the reasons given by Dr. Whitley Stokes were that "it was pronounced by some competent persons to be unsuited to India. It was far from complete; it was ill-arranged; it was not elementary enough for the officers for whose use it was designed; and it assumed an acquaintance with the law of England which would scarcely be expected from them." A new Bill was then prepared by Sir James Stephen and it was with

(1) For those Regulations see Whitley Stokes' *Anglo-Indian Codes*. Vol. II. p. 813.

(2) See *Ibid.* p. 813.

(3) Morley's *Digest*. Introduction lxxxiii.

(4) For these 11 Acts see Whitley Stokes *Anglo-Indian Codes*. Vol. II. pp. 813-14.

some alterations, passed as Act I of 1872. This Act has I, RC. VII. been amended by the following five Acts:—

- (a) Act XVIII of 1872.—Verbal alterations in ten sections §§32 (5) (6) ; 41, 45, 57, 66, 91, 108, 126, 128, 155. Act I of 1872.
- (b) Act III of 1887.—A new section substituted for old section 125.
- (c) Act III of 1891, §§ 1—8.—Eight sections amended (§§14, 15, 26, 30, 43, 54, 55, 86).
- (d) Act V of 1899.—2 sections amended (§§45, 86), 2 sections added to (§§37, 73), 1 section partially repealed (§86 of Act I of 1872).
- (e) Act XIV of 1908 §13 (Criminal Law Amendment Act of 1908).—§33 of the Evidence Act over-riden in certain cases.

Thus we see that out of 167 sections of the Indian Evidence Act (I of 1872) only 25 sections have been affected by subsequent legislation and most of these amendments are nothing more than mere verbal alterations and that one of them (Act XIV of 1908 § 13) was made at a time of great political agitation and to meet a particular kind of offence. This Code, in spite of all adverse criticisms, has stood the test of time for nearly half a century and it is time that this code should be revised.

We have noticed before that prior to July 1859 there were no less than 9 different systems of Civil Procedure simultaneously in force in British India (1). We have also noticed that Sir Elijah Impey drafted the Regulation for regulating the procedure of the Company's Courts in the Muffasil

Civil Procedure.

First Civil Procedure Code (1781).—Sir Elijah Impey, Chief Justice of the Supreme Court at Calcutta was appointed a judge of the *Sadur Dewani Adwalat* on the 24th October 1780 by Warren Hastings (2). The new Judge's first act was to draw up a Regulation consisting of 95 sections, which consolidated the useful portion of all previous rules with proper principles of procedure, so as to make a simple Code for the Muffasil Courts. He introduced the doctrine of justice, equity and good conscience as a rule of substantive law to be administered in civil cases not otherwise pro-

(1) See Lecture II Necessity of Codification in British India

(2) Sir Elijah Impey was recalled for having accepted the office, and his appointment formed one of the articles of impeachment against Hastings. Sir Elijah Impey declined to appropriate any portion of the salary of the new office, until the pleasure of the Lord Chancellor should be known.

L.R.C. VII.

Impey's Civil
Procedure Code.

vided for, a provision which is now incorporated into the Civil Courts Act (1). This Regulation for the "administration of Justice in the Courts of Mofussil Dewannee Adalut" was passed on the 5th July 1781. The last portion of its preamble runs as follows:—"And whereas at different times, and under different circumstances of the Courts of Mofussil Dewannee Adalut, and of the Sudder Dewannee Adalut, divers Rules, Ordinances and Regulations, as occasion did require, were made and framed for the administration of justice, many of which are not adapted to the state of the present Courts: for the better ascertaining, as well the powers, authority and jurisdiction of the said Courts as the countries, districts and places over which the same do and shall extend; for the explaining such rules, orders and regulations, as may be ambiguous; and revoking such as may be repugnant or obsolete; and to the end, that one consistent Code be framed therefrom; and that the inhabitants of these countries may not only know to what Courts and on what occasions they may apply for justice, but, seeing the rules ordinances and regulations, to which the Judges are by oath bound invariably to adhere, they may have confidence in the said Courts, and may be apprized on what occasions it may be advisable to appeal from the Courts of Mofussil Dewannee Adalut to the Court of Sudder Dewannee Adalut "

This Regulation was printed at the Hon'ble Company's Press in 1781. A Persian translation of this Regulation, made under the orders of Government by Mr. W. Chambers, was printed by Mr. C. Wilkins in 1782. A Persian abridgment by the same gentleman was again translated into English and this version of the Persian Abridgment was printed at the Honourable Company's Press and published in 1783, with the counter-signature of Mr. Chambers "by order of the Governor-General in Council." This Regulation was translated "into the Bengal language" in 1783 by Mr. Duncan (afterwards the Governor of Bombay) and printed, with a reimpression of the original English in opposite pages. This edition published in 1785 contained a supplement. (See Colebrooke's *Supplement* p. 86.) Sir Elijah Impey's Regulation was amended by various Regulations before 1859.

We have already noted the fact that to avoid the evils of diversity and uncertainty of law, the members of the

(1) For the original Regulation see Colebrooke's *Supplement to the Digest of the Regulation and Laws*. p. 37.

First Indian Law Commission were asked to enquire into all existing forms and judicial procedure in force in British India and to suggest such alterations as might in their opinion be beneficially made in those forms. They drafted a Code of Civil Procedure but no action was taken in the matter by the Government of India until 1853 when Mr A. J. Moffatt Mills and Sir H. B. Harington (then Mr. H. B. Harington) were appointed "Special Commissioners for revising the Code of Civil Procedure" Under special instructions of Sir Charles Wood, then President of the Board for the affairs of India, these Commissioners drafted 4 Reports, containing 4 draft codes of procedure for all ordinary Civil Courts in the Lower Provinces of Bengal (with the exception of the Presidency Small Cause Court at Calcutta), the North-Western Provinces, Madras and Bombay. In 1857 four Bills, founded on these 4 drafts were introduced into the Legislative Council by Sir Barnes Peacock. These Bills were referred to Select Committees, were then amalgamated and became law as Act VIII of 1859. This code did not apply to the Supreme Courts nor to the Presidency Small Cause Courts. Nor did it extend to the Non-Regulation Provinces. Section 37 of the Letters Patent of December 28, 1865 made the provisions of the Civil Procedure Code applicable to the High Courts in the exercise of civil, testamentary, intestate and matrimonial jurisdictions (1) The code of 1859 together with its amending Acts was repealed by the code of 1877 (X of 1877) which in its turn had been repealed by the code of 1882 (XIV of 1882). The code of 1882 has been repealed by the present code (V of 1908).

All these codes contained provisions about *Res judicata* because the rules of *res judicata* are rules of procedure. Though the subject of *res judicata* was dealt with more comprehensively in the code of 1882 than in the old one yet §§13 and 43 were not exhaustive. Law was and still is (§11 Act V of 1908) substantially the same as the English law (2)

We find no mention of this doctrine in Impey's Civil Procedure Code (Judicial Regulation dated 5th July 1781) but in section XXII of the Judicial Regulation of the 27th June 1787 (3) we find it stated that section XXII of Regulation of July 1781 (Impey's Code) should conclude as follows:—"Nor to hear and entertain any cause, which from

(1) For intestate and testamentary jurisdiction see §§238, 261 Succession Act (X of 1865). For matrimonial jurisdiction see the *Indian Divorce Act* (IV of 1869) §45.

(2) *Ramaswami v. Vythinatha* (1903) 26 M. 760, 770.

(3) *Colebrooke's Digest*. p. 102.

REC. VII.

Res Judicata.

This doctrine not derived from Livingston's Code.

the production of a former decree, or from the records of the said Court, shall appear to have been heard and determined by any former Judge, or superintendent then having competent jurisdiction ; and if in any case a doubt should arise respecting the competency of the former jurisdiction, the Judges are to report the same to the Sudder Dewanny Adawlut and wait instructions." It seems that this addition to Impey's Regulation was made in consequence of the decision in the celebrated case of Duchess of Kingston which was decided in April 1776. Thus we find that long before the passing of the Civil Procedure Code of 1859 this doctrine or at least that portion of it which relates to what is designated "bar by judgment" was introduced into this country. It is sometimes stated that the provisions of the Civil Procedure Codes relating to *res judicata* are derived mainly from Livingston's Code of Evidence for Louisiana §§192, 198 (1) But *Civil Code of Louisiana*, the oldest American code, was not passed till 1808 (2) While the doctrine of *res judicata* was introduced into India by the Regulation of 27th June, 1787 So we find that at least in this case the Anglo-Indian legislators are not indebted to American law for their inspiration

Limitation.

Prior to 1850, there were different systems of limitation laws, not only in different Presidencies but also in different courts in the same Presidency In 1842, the Indian Law Commissioners framed a Bill embodying a uniform law of limitation for all the courts in British India That Bill with some amendments suggested by Sir James Colville and Sir Barnes Peacock, afterwards became Act XIV of 1859 But the Privy Council once remarked that it was an inartistically drawn statute (3). Act IX of 1871 was then framed on a scientific plan, Act XV of 1877 and IX of 1908 reproduced it with certain important amendments The scheme of the present Act consists in dividing the limitation law into five parts and in collecting the preliminary rules into the first part, certain rules of general application and rules relating to computation of the period of limitation into the second and third parts and in appending to them a tlicolumnar schedule, specifying the several description of suits, the period of limitation in regard to each, and the time from which the period begins to run.

(1) Whitley Stokes' *Anglo-Indian Codes* Vol. II p. 392. Casperz on *Estoppel* 3rd Ed. p. 7. Hukumchand on *Res Judicata*

(2) See the Introductory under heading "Codification in America."

(3) *Delhi and London Bank v. Orchard* (1877) 3C. 47, 57.

Act XV of 1877 was modified by 14 different enactments LEC. VII.
 between 1877 and 1908. For some years prior to 1907 there was a difference of opinion as to the period of time, within which suits to enforce payment of money secured by mortgages other than English mortgage might be brought; Allahabad, Bombay and Madras High Courts held that such cases were governed by Art 147 and the period was sixty years. While the Calcutta High Court held that Art 132 applied and the period was twelve years. In 1907 the Privy Council decided that the period was 12 years only (1). This decision caused considerable hardship in the territories where the sixty years' rule prevailed. The Government of India were of opinion that some provisions should be made to remove the difficulty caused by the decision of the Privy Council and a Bill was accordingly introduced into the Legislative Council providing that suits in the provinces in which sixty years rule prevailed might be brought within two years from the passing of the Bill. This Bill which also made few other changes became Act IX of 1908 (2).

So far as the law relating to Revenue procedure is concerned, the law is to be found in the enactments mentioned in this Lecture. In the next lecture I shall show how far codification has touched Hindu and Mahomedan Law Adjective Law.
Revenue
Procedure.

(1) *Tasudeva v. Srinivasa* (1907) 30M.L. 326.

(2) For Regulations relating to the law of Limitation see Lecture VIII.

LECTURE VIII

HOW FAR CODIFICATION HAS TOUCHED HINDU AND MAHOMEDAN LAW.

Law administered
in British India.

Law administered in the British Indian courts may be divided into three parts viz.—I. Hindu and Mahomedan Law in certain cases. II. Legislative enactment. III. The rule of justice, equity and good conscience. Large portions have been transferred from the domain of Nos. I. and III. to that of No. II. Thus, Adjective Law is at present entirely statutory—both Hindu and Mahomedan laws on the subject have been done away with. Then again while there was nothing in the Mahomedan law about the law of limitation, the Limitation Act is binding on all British Indian subjects whether Hindus or Mahomedans. Before the passing of the Indian Contract Act many points, on which there was no provision in Hindu or Mahomedan Law, were decided according to the doctrine of justice, equity and good conscience; but after the passing of that Act the Judges are bound to decide such cases by the provisions of that Act and in cases not provided for in the Contract Act the Judges can still decide them according to the doctrine of justice, equity and good conscience.

It has already been mentioned that Rule 23 of the Plan of Warren Hastings (1772) enacted “that in all suits regarding inheritance, marriage, caste and other religious usages, or institutions, the laws of the Koran with respect to Mahometans, and those of the *Shaster*, with respect to Gentoos shall be invariably adhered to.” Now, the first question to be answered is—what is the meaning of the word Gentoos? Who are they? There is a conflict of opinion about the origin and meaning of this word.

First, I shall give the derivation and meaning of the word as given by Halhed in his Translator’s preface to “Gentoo Law.” The Regulation to which I have referred was passed on the 21st August 1772 and Halhed’s translator’s preface was written in February 1775. Then again Mr. Nathaniel Brassey Halhed was asked by Warren Hastings to compile the Gentoo Code and it is possible that the word had been used in the Regulation of 1772 and the translator’s preface of 1775 in the same sense.

Gentoo.
Its meaning.

“The word *Gentoo*” says Halhed “has been, and is

still, equally mistaken to signify, in the proper sense of the term, the professors of the Braminical religion, whereas *Gent or Gentoos*, means animal in general, and in its more confined sense, mankind ; but is never in the Sanskrit dialect, nor even in the modern jargon of Bengal, appropriated particularly to such as follow the doctrines of Brihma. The four great tribes have each their own separate appellation, but they have no common or collective term that comprehends the whole nation under the idea affixed by Europeans to the word *Gentoo*. Possibly the Portuguese on their first arrival in India, hearing the word frequently in the mouths of the natives as applied to mankind in general, might adopt it for the domestic appellation of the Indians themselves ; perhaps also their bigotry might force from the word *Gentoo* a fanciful allusion to *Gentile*, a *Pagan*." (1).

LEC. VIII.

Halhed.

Sir Edward Hyde East, in his evidence before the Committee of the House of Lords in 1830, speaking of the term "*Gentils*" used in the 21 Geo. III. C.70 observes, "whether that was intended to comprehend all other descriptions of Asiatics who happened to be located within the British bounds of India is perhaps very difficult to be told at this time of day" (2).

Sir Edward Hyde East.

In *Ardascer v. Perozeboye* (3) Mr. Ayrton argued that the Parsees were within the definition of "*Gentoo*" which, he said was a generic term, being corrupted from a Portuguese word "*Gentilis*," meaning a gentile or heathen, as distinguished from Mahomedans or Hindus, the native inhabitants of India.

6 M. I. A. 348, 383

The word *Gentoo* derived from the Portuguese *gentio* = a gentile or heathen came to mean "a native of India, a Hindu" (4).

Field.

This provision of the Plan of Warren Hastings (R. XXIII) was reproduced in the Regs. of 11th April 1780 ; 5th July 1781 and of the 27th June 1787. Section 15 of Reg. IV of 1793 which reproduced the Rule was extended to the Province of Benares by §3 of Reg. VIII of 1795 with the following addition viz. :—"In causes in which the plaintiff

(1) Halhed's *Gentoo Code*. Translator's preface. pp XXI, XXII. "Hindoo is not the term by which the inhabitants of India originally styled themselves, but according to the idiom of this language, *Jumboodepee* ; and it is only since the era of the Tartar Government that they have assumed the name of Hindoos, to distinguish themselves from their conquerors, the Mussulmen". Ibid. p. XXI.

(2) *Morley's Digest*. Introduction p. CI,XXXVII.

(3) (1856) 6 M. I. A. 348, 383

(4) *Field's Regulations of the Bengal Code*. p. 169.

L.B.C. VIII.

Plan of
Warren Hastings
R. XXIII.

shall be of a different religious persuasion from the defendant, the decision is to be regulated by the law of the religion of the latter ; excepting where Europeans or other persons, not being either Mahomedans or Hindus, shall be defendants, in which cases the law of the plaintiff is to be made the rule of decision in all plaints and actions of a civil nature "

Reg. V of 1831

The Munsiffs, Sadr Amins and Principal Sadr Amins Regulation (1) (Reg. V of 1831) §6 (2) provided that in all cases of inheritance of, or succession to, immoveable property, the Mahomedan laws with respect to Mahomedans, and the Hindu laws with regard to Hindus, were to regulate the decision. It was also provided that the principal Sadr Amins were to be guided in the trial of original suits and appeals by the rules established for the conduct of business in the Courts of Sadr Amins.

Reg VII of 1832.

The above mentioned Benares rule (Reg. VIII of 1795 §3) was repealed by §8 of Reg. VII of 1832 ; and the rules contained in Reg IV of 1793 §15 and Reg. III of 1803 §16 (1) became the rules of guidance in all suits regarding succession, inheritance, marriage and caste and all religious usages and institutions that might arise between persons professing the Hindu and Mahomedan persuasions

Act XII of 1887.

The Bengal, Agra and Assam Civil Courts Act (XII of 1887) §37, repealing Act VI of 1871 §24, contains a similar provision.

Bombay.

Bombay Regulation IV of 1827 §26 provides that in the absence of Acts and Regulations of Government, the usage of the country in which the suit arose and if none such appears, the law of the defendant should be the law to be observed by the Courts.

Madras.

The Madras Civil Courts Act (III of 1873) §16 also reserves the Hindu and Mahomedan law to the Hindus and Mahomedans respectively in cases involving any question regarding succession, inheritance, marriage or caste, or any religious usage or institution It also provides that in cases where no specific rule exists the court shall act according to justice, equity and good conscience

Thus we see that a long series of legislative provisions (2) has been enacted for the purpose of securing to the people of India the maintenance of their ancient law, amongst others in matters of inheritance and succession, and many minor enactments have been passed to facilitate the

(1) By this Regulation Munsiffs were for the first time invested with power to try suits for real property.

(2) Reg. of 11th April 1780 ; Reg. of 5th July 1781 ; Reg. of 27th June 1787 , Reg. IV of 1793 §15.

administration of the laws so preserved. The object and principle of such legislation has been throughout to enable the people of various races and creeds in India to live under the law to which they and their fathers had been accustomed, and to which they were bound by so many ties. LEC. VIII.

The framers of the earlier Acts, regulations, and Charters had a less detailed acquaintance than we have now with the diversities of creed and of religious law existing in India. They were familiar with two great classes, Mahomedans and Hindus, each with its own law bound up with its own religion. They thought no doubt that they were sufficiently providing for the case by securing to Mahomedans the Mahomedan law, and to Hindus (or Gentūs, as they were sometimes called) the Hindu law. In process of time it became more and more clearly understood that there were more forms than one of the Mahomedan law, and more forms than one of the Hindu law, and the Courts, acting in the spirit which prompted the legislation, have applied the law of each school to the people whose ancestral law it was. In the same way it came to be known that there were religious bodies in India which had, at various periods and under various circumstances, developed out of, or split off from, the Hindu system, but whose members have nevertheless continued to live under Hindu law. Of these the Jains and the Sikhs are conspicuous examples. Their cases had to be considered by the Courts, and in dealing with them a liberal construction was always placed upon the enactments by which Mahomedans and Hindus were secured in the enjoyment of their own laws.

R. XXIII of Plan
of Warren
Hastings
Its defect.

There have been modern instances, in which, in the light of more complete knowledge, the various creeds of India have been more accurately, or at least more carefully, distinguished than they once were. Thus the Hindu Wills Act (XXI of 1870) is made applicable to the will of any Hindu, Jaina, Sikh, or Buddhist. Act III of 1872, passed to provide a form of marriage for persons not professing the Christian, Jewish, Hindu, Mahomedan, Parsi, Buddhist, Sikh, or Jaina religion, enumerates those religions accordingly. And the Married Women's Property Act (III of 1874) similarly distinguishes Hindus, Mahomedans, Buddhists, Sikhs, and Jains.

But though, in some modern Acts religions are carefully distinguished in detail, in others the old form of language is used, and with the old generality of meaning, e.g. the Punjab Laws Act (Act IV of 1872) §5 which enacts that in

L.E.C. VIII.

questions regarding succession, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be (i) any special custom applicable to the parties concerned ; (ii) the Mahomedan law in cases in which the parties are Mahomedans, and the Hindu law in cases in which the parties are Hindus. "It is impossible to suppose" says Sir Arthur Wilson (1) "that the Legislature in laying down the law for the Punjab, while providing a rule of decision for Mahomedans and Hindus, should have overlooked the case of the Sikhs, or left them dependent only upon such customs as they might be able to prove. It seems clear that the Legislature used the old phraseology in the old sense, and included Sikhs under the term Hindu."

The Punjab
Civil Code.

Soon after the annexation of the Punjab the Board of Administration became fully aware of the ambiguity of Hindu and Mahomedan laws, of which the original character had become obscured by judge-made law. Therefore the Punjab authorities ascertained and embodied in the Punjab Civil Code what were understood to be the leading principles of those laws. For that purpose, they consulted all the leading law books, and set forth the principles in consultation with the best *Pandits* and *Maulavis* in the Punjab, and experience had shewn that the principles collated in that way were suited to the circumstances of the province, and had been generally adopted. The Committee on the Punjab Laws Bill considered that in so far as the Punjab Civil Code professed to declare the Hindu or Mahomedan law, it must be taken to be subject to those laws ; and that in so far as it differed from them it must be taken to alter them. The Committee accordingly extracted from the Punjab Civil Code those passages in which it differed from the ordinary Hindu and Mahomedan law, enacted them specifically as law and declared that, subject to those alterations, Hindu and Mahomedan laws were in force in the Punjab. The Bill so drawn was referred to the Judges of the Chief Court of the Punjab for their opinion. The Judges said that they had not been in the habit of recognizing as law the deviations from Hindu and Mahomedan law which occurred in the *Punjab Civil Code*, and that in fact they regarded the *Punjab Civil Code* rather as declaratory of that form of the Native law which prevailed in the Punjab than as being

(1) *Bhagwan Kuar v. Jogendra* (1903) 30 I. A. 249, 255 ; 31 C. II, 20, 31.

itself law, except in regard to the two subjects of pre-emption and insolvency. The Committee accordingly struck out of the Bill the variations upon Hindu and Mahomedan laws taken from the Punjab Civil Code retaining only its provisions as to pre-emption and insolvency. Referring to this modification Sir Richard Temple then a member of the Council of the Governor-General remarked that no doubt that was the weak point of the Bill. Instead of those simple principles which had been so long observed, instead of that abstract of Hindu and Mahomedan law, there was substituted a reference to the body of those laws as discoverable by the court from various existing authorities. If the code as it stood was not accepted by the court as law, what was to be done? One way was for the Council of the Governor-General to give the impress of its authority to the principles laid down in the Punjab Civil Code. Though he maintained the perfect correctness of the principles laid down in the Code, yet he thought the Council could not, on its own responsibility be asked to pass all these sections on the assurance that the Code was absolutely and certainly correct. That being so, there was nothing for it but to draft the Bill as it had been drafted. But he could only hope that, when questions of Hindu or Mahomedan law arose, litigants in the Punjab Law Courts would refer to the well-established principles of that Code, and recognize them as binding. Moreover, after the passing of the Punjab Laws Bill there would be nothing to prevent the Executive Government, or the Chief Court in its capacity of minister of justice prescribing the Code as a manual for young officers.

The Punjab Laws Act (IV of 1872) granted statutory recognition to local custom which was placed in the foreground for decision of all matters regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, family relations, wills, legacies, gifts, partitions, alluvion or diluvion. From this time custom became the first rule of decision in all the Punjab Courts upon questions relating to any of the above-named matters.

Section 13 of the Burma Laws Act (XIII of 1898) provides, amongst other things, "where in any suit or other proceeding in Burma it is necessary for the Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution,—(a) the Buddhist law in cases where the parties are Buddhists, (b) the Mahomedan Law in cases where the parties are Mahomedans,

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Why modified provisions of Hindu and Mahomedan Law omitted from the Punjab Laws Act.

Buddhist Law.

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and (c) the Hindu law in the cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has by enactment been altered or abolished, or is opposed to any custom having the force of law.”

Similar provisions have also been made by the Central Provinces Laws Act (XX of 1875) §5 and also by the North-West Frontier Province Law and Justice Regulation (1). (Reg VII of 1901 §27).

Justice, equity and good conscience

Reg. of 5th July 1781 Sec 60.

The Plan of Warren Hastings (1772) made no provision for cases not falling within Rule 23. This defect was removed by Sir Elijah Impey in the Regulation of 5th July 1781. Section 60 of that Regulation enacted “That in all cases, within the jurisdiction of the Moffusil Dewannee Adauluts, for which no specific directions are hereby given, the respective judges thereof do act according to justice, equity and good conscience”.

Reg. of 5th July 1781 Sec 93

Section 93 of the same Regulation provided “That in all cases, for which no specific directions are hereby given the Judges of the Sudder Dewannee Adaulut do act according to justice, equity, and good conscience” These two provisions of the Judicial Regulations of 5th July 1781 were re-enacted by the Judicial Regulation of 27th June 1787 (2) Reg III of 1793 (3), Reg V of 1793 (4); Reg VI of 1793 (5), Act XXVI of 1852 (6) All these enactments have been repealed but these provisions are now to be found in the Provincial Civil Courts Acts and Bom. Reg IV of 1827 §6 so far as the Moffusil Civil Courts are concerned, and in the Charters of the different High Courts (7).

Burma Laws Act (XIII of 1898) §13 mentions the cases in which “decision shall be according to justice, equity and good conscience

Early Administrators and indigenous laws.

The early English administrators, though unwilling to interfere with the indigenous laws of the country, had to and did modify the rules of Hindu and Mahomedan law. It was impossible for them with their ideals to tolerate for any length of time usages and customs which they were at first compelled to permit as bearing the sanction of religion. Thus they made the criminal law applicable to all castes and did away with the exemption of Benares Brahmins from

(1) See the Punjab and North-West Code. 3rd Ed. p 559.
 (2) §§LIX and XC Colebrooke's Digest. pp. 107, 109
 (3) §21 of Reg. III of 1793 (Zillah and City Courts).
 (4) §XXXII of Reg V of 1793 (Provincial Courts of Appeal).
 (5) §XXXI of Reg VI of 1793 (Sudder Dewanny Adaulut).
 (6) Sadar Amins and Munsifs Act. §III
 (7) See Supra also Lecture II. Heading Justice, equity and good conscience.

death penalty in 1817 (1), they made the throwing of children into the sea at *Sagor* and other places, a criminal offence (2), they also made sitting *Dharna* (i.e. the practice of Brahmin creditors to enforce payment of real or fictitious debts) a crime (3) and prohibited the burning of widows alive on the death of their husband in 1830 (4) and abolished slavery in its different forms at different times (5). The British Indian legislators exercised this right in 1891 when the age of consent by a wife to have sexual intercourse with her husband was raised from ten to twelve years (6). Where the injustice was patent they also modified the rules of succession, inheritance and marriage, thus they abrogated the rules of Hindu law which deprived a convert from Hinduism to any other religion of his property and many of his civil rights (7) and legalized widow remarriages (8). They also repealed the religious law which compelled a person to pay the debts of his father and grand-father, under the penalty of the deceased being excluded from heaven, by legislation (9). Now let us take the different branches of law and examine how far codification has affected those branches of Hindu and Mahomedan law.

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Substantive
Public law

There was very little of constitutional law in India when the British first came to this country and at the present time there are a number of enactments—Statutes of British Parliament—Acts of the Imperial Government and those of the Provincial Governments—on this subject, but yet, as we have seen before (10) the law on the subject has not been codified. It will not be accurate to state that there was no Hindu constitutional law but it was not constitutional law in the sense in which the expression is now used, because the duties and functions of the sovereign were defined by the divine law of the Hindus laid down in the *Smritis*.

Constitutional
law.

(1) Reg. XVII of 1817 §15.

(2) Reg. VI of 1802.

(3) Reg. VII of 1820. Act of *Dharna* was a misdemeanor punishable in Mahomedan Law.

(4) Reg. XVII of 1829.

(5) Reg. X of 1811 (Importation of slaves by land or by sea prohibited), Reg. III of 1832 (Operation of Reg. X of 1811 was declared to be in force in parts of British India annexed thereto after 1811), Act V of 1843 (The Indian Slavery Act); Penal Code §370; 39 & 40 Vic. c. 46.

(6) Act X of 1891 amending §375 of the Indian Penal Code.

(7) *The Caste Disabilities Removal Act* (XXI of 1850).(8) *The Hindu Widows' Remarriage Act*, (XV of 1856).(9) *Bom. Act I of 1866*. See Shastri's *Hindu Law*, 3rd Ed.

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Mr. Justice Rahim in his Tagore Lectures (1) deals with Mahomedan constitutional law and I shall not take up your time in recapitulating what he says there.

Though the constitutional law has not yet been codified in British India, yet it is evident from the enactments relating to this subject that the conception of "Sovereign!!" "Sovereignty" and "the relation between the Sovereign and his subjects" as used in the British Indian enactments is different from that according to ancient Hindu and Mahomedan Law.

Criminal Law

The administration of criminal justice in Bengal at the time of the East India Company's acquisition of Dewanny, had been guided for more than two centuries, by the penal system of the Mahomedans, by whom it had been forced upon the Hindus by right of conquest (2)

Procedure in
criminal cases.
Criminal Courts

On the Company's first acquisition of the Dewanny, it was deemed advisable to interfere but little with the existing system. Instead of abrogating the Mahomedan Criminal law, instead of immediately subverting the existing system, and destroying the old institutions, because they were not based on the principles familiar to the Anglo-Indian administrators or because their functions were ill-discharged, it was determined to introduce improvements with caution. The administration of criminal justice was therefore left to the tribunals previously instituted. The Nazim, as the Supreme Magistrate, presided personally at the trial of capital offenders; the deputy of the Nazim took cognizance of quarrels, frays and abusive names; the Foujdar was the officer of police, the judge of all crimes not capital; proofs of these last were taken before him, and reported to the Nazim for his judgment and sentence upon them;—the *Mohlesib* had cognizance of drunkenness and of the vending of spirituous liquors and intoxicating drugs, and the examination of false weights and measures;—the *Cotwal* was the peace officer of the night, dependent on the *Foujdaree*. These officers were confined to the capital (3) and beyond its precincts, the zamindar, who was originally the chief fiscal officer of a district, exercised both a civil and criminal jurisdiction almost supreme within the territory over which he was appointed to preside. The minor offences he visited with fines, imprisonment or corporal

(1) *Mahomedan Jurisprudence* Ch. XI p. 383. (Tagore Lectures for 1907).

(2) See Beaufort's *Digest of Criminal Law* p 1

(3) *Murshidabad*. See *Field's Regulations* p 135.

punishment, according to his individual pleasure or sense of justice; and even in capital cases he was under no further restraint than that of reporting the circumstances to the Nazim before proceeding to execution. The Government rarely interfered with his decisions. LÆC VIII

Even when the courts of the East India Company administered the criminal law, the Mahomedan criminal law, as modified by the Regulations and Acts of the Government, continued to be the general criminal law of the country (1) Right of the
Company to alter
the rules of
Mahomedan Law

Soon after the acquisition of *Deewanny* by the East India Company, the important question whether the Company could alter the rules of Hindu and Mahomedan law, presented itself for solution. It arose in this way,—Rule 35 of the Plan of 1772 provided that *dacoits* on conviction should be sentenced to death, but the Maulavis in the Provincial Courts refused to pass sentence of death on dacoits unless the robbery committed by them had been attended with murder. Warren Hastings maintained that the rule of Mahomedan law followed by the Maulavis in passing sentence in cases of dacoity should be abrogated. He maintained that the company as the Sovereign authority in the country could abrogate rules of Mahomedan law and in a letter to the Council (1) remarked “The Mahomedan Law is founded on the most lenient principles, and an abhorrence of bloodshed. This often obliges the sovereign to interpose, and by his mandate to correct the imperfection of the sentence, to prevent the guilty from escaping with impunity, and to strike at the root of such disorders as the law will not reach. It is worthy of remark, that the instances, which are recorded in history of strict and exemplary justice in the princes of that religion, are all of the most sanguinary kind, and inflicted without regard to the law, and generally without any regular process or form of trial.

“I should be sorry to recommend an example of such rigor for the practice of our government. I mean only by this short discussion to show, that it is equally necessary and conformable to custom for the sovereign power to depart in extraordinary cases from the strict letter of the

(1) Under the Plan of Warren Hastings *Phoujdaree Adaululs* or Criminal Courts were established in each district and *Nizamut Sudder Adaulul* was established at Moorshidabad (which was then the capital of Bengal). Rule XXXV of this Plan modified the provisions of the Mahomedan Criminal Law relating to *dacoity*.

(1) *Extract from a letter from Warren Hastings, President of the Council, dated 10th July 1773 recorded in the proceedings of the Council, 3rd August 1773. Colebrooke's Digest pp 114, 115. See also Harington's Analysis Vol. I. pp 350, 351 (1805-09 Edition).*

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Opinion of
Warren Hastings

law, and to recommend the same practice in the cases now before us.

“I offer it therefore as my opinion, that the punishments decreed by this government against professed and notorious robbers be literally enforced ; and where they differ from the sentences of the *adaulut*, that they be superadded to them by an immediate act of government, that every convicted felon, and murderer, not condemned to death by the sentence of the *Adaulut*, and every criminal who has been already sentenced either to work during life upon the roads, or to suffer perpetual imprisonment, be sold for slaves, or transported as such to the Company’s establishment at Fort Marlborough ; and that this Regulation be carried into execution by the immediate orders of the Board, or by an office instituted for that purpose in virtue of a general order or commission from the Nazim” (1).

In this letter Warren Hastings also discussed and gave his opinion on the following questions relating to the subject we are discussing now.—

I. Whether the *Futwa* or decree of the Nizamut Adaulut, after it shall have received the confirmation of the Nazim, shall be carried into execution precisely in the terms of his warrant, or whether this Government shall interfere in adding to, or commuting, the punishment in cases wherein it shall appear inadequate to the crime, or ineffectual as a check?

“I am of opinion” said Warren Hastings “that whenever it shall be found necessary to supersede the authority of the Nazim, to supply the deficiencies or to correct the irregularities of his Courts, it is the duty of this Government to apply such means as in their judgment shall best promote the due course and ends of justice ; but that this license ought never to be used without an absolute necessity, and after the most solemn deliberation ” In support of his view he said “Although we profess to leave the Nazim the final judge in all criminal cases, and the officers of his courts to proceed according to their own laws, forms and opinions independent of the control of this Government ; yet many cases may happen, in which an invariable observance of this rule may prove of dangerous consequence to the power by which the Government of this country is held, and to the peace and security of the inhabitants. Wherever such cases happen, the remedy can only be obtained from those in whom the sovereign power exists.

(1) Colebrooke’s *Supplement* p. 115.

It is on these, that the inhabitants depend for protection, and for the redress of all their grievances, and they have a right to the accomplishment of this expectation, of which no treaties nor casuistical distinctions can deprive them. If therefore the powers of the Nizamut cannot answer these salutary purposes ; or, by an abuse of them, which is much to be apprehended from the present reduced state of the Nazim, and the little interest he has in the general welfare of the country, shall become hurtful to it, I conceive it to be strictly conformable to justice and reason to interpose the authority or influence of the Company, who as *dewan* have an interest in the welfare of the country, and as the governing power have equally a right and obligation to maintain it ”

“Although this is my opinion upon the question as it respects the rights of justice, and the good of the people, I am sorry to add, that every argument of personal consideration strongly opposes it, having but too much reason to apprehend, that while the popular current prevails, which overruns every sentiment of candour towards the Company and its agents, it will be dangerous both to our characters and fortunes to move a step beyond the plain and beaten line , and that, laudable as our intentions were, we have already done too much ”

II. Whether the distinction which is made by the Mahomedan law between murder perpetrated with an instrument formed for shedding blood, and death caused by a deliberate act, but not by the means of an instrument formed for shedding blood, shall be admitted, and whether the fine imposed on the latter shall be allowed as a sufficient punishment ?

In giving his opinion on this point Warren Hastings observed “If the intention of murder be clearly proved, no distinction should be made with respect to the weapon by which the crime was perpetrated. The murderer should suffer death, and the fine be remitted.” He also proved the inequality and injustice of the decisions founded on this distinction

III. Whether the punishment decreed by the 35th Article of the Judicial Regulations formed by the Beard, shall be carried into execution without the sentences of the Nizamut Adaulat, or the warrant of the Nazim ; and in what manner ?

“Upon this question” said Warren Hastings “I have already declared my opinion in the affirmative. I would

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recommend that every case, to which this ordinance may be applied, be laid before the Board, and their sanction obtained for its being carried into execution.

IV. Whether the privilege granted by the Mahomedan law to the sons or nearest of kin, to pardon the murderers of their parents or kinsmen, shall be allowed to continue in practice, or in what manner the Government shall proceed in cases of this kind ; if it shall be judged expedient to make an example of the criminals in opposition to the letter of the law, and the sentences of the court of the Adaulut ?

“This law” says Warren Hastings “though enacted by the highest authority which the professors of the Mahomedan faith can acknowledge, appears to be of barbarous construction, and contrary to the first principle of civil society by which the state acquires an interest in every member which composes it ; and a right in his security. It is a law, which, if rigidly observed, would put the life of every parent in the hands of his son, and by its effect on weak and timid minds, (which is the general character of the natives of Bengal) would afford a kind of pre-assurance of impunity in those who were disposed to become obnoxious to it.

“If the Nazim cannot be influenced to abolish totally this savage privilege, which we know is not universally admitted, or the courts of justice to disuse it, I am of opinion that the Government should interfere by its own authority to prevent it taking effect, by causing the sentence to be executed without leaving an option in the children or kinsmen to frustrate it by their pardon”.

V. Whether the law which enjoins the children or nearest of kin to the person deceased to execute the sentence passed on the murderers of their parents or kinsmen, on account of its tendency to cause such crimes to pass with impunity, shall be permitted to continue, or whether it shall not be abolished by a formal act of Government ?

“This law” says Warren Hastings “supposed of the same divine original, is yet more barbarous than the former and in its consequences more important. It would be difficult to put a case, in which the absurdity of it should be more strongly illustrated, than in one now before us, of a mother condemned to perish by the hands of her own children for the murder of her husband. Their age is not recorded, but by the circumstances, which appear in the proceedings, they appear to be very young. They have pardoned their

mother. They would have deserved death themselves, if they had been so utterly devoid of every feeling of humanity, as to have been able to administer it to her who gave them life. I am of opinion, that the courts of justice should be interdicted from passing so horrid a sentence, by an edict of the Nazim, if he will be persuaded to it ; by the Government, if he refuses".

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VI. "Whether fines inflicted for man-slaughter shall be proportioned to the nature of the crime, as the Mahomedan law seems to intend : or both to the nature and degree of the crime, and to the substance and means of the criminal."

The answer was "Both. If the fine exceeds the means of the criminal it must deprive the state of his service, and prove a heavier punishment than the law has decreed him".

VII. "Whether the fines shall be paid to the Nazim, or taken by the Company as Dewan, or whether they shall not be set apart for the maintenance of the courts and officers of justice, and for the restitution of the losses sustained by the inhabitants from dacoits and thieves "

In Hastings' opinion it could not be better or more equitably employed than for the uses expressed in the concluding terms of the question.

In giving his opinion on the seven questions mentioned above, Warren Hastings said "Although it was incumbent upon me to deliver my own opinion upon the above references, I have offered it with diffidence, and I confess with some reluctance, knowing the objections to which every kind of innovation is liable, but more especially in the established laws or forms of justice. But I conceive, that the points which I have offered to your (Board's) consideration will be found in reality not so much to regard the laws in being, as the want of them, a law which defeats its own ends and operation being scarce better than none" (1)

On the 31st August 1773, the other members of the government, having considered the letter addressed to them by Hastings recorded their opinion on it. But while supporting the remarks of Hastings they asked him to ascertain the views of the Nawab and his officers.

In consequence of the abolition of the controlling Council of Revenue in Moorshidabad, the Nizamat Adaulat

(1) Colebrooke's *Supplement* pp. 116—119. Extract from a letter from Warren Hastings Esq. President of the Council, dated 10th July 1773, recorded in the proceedings of Council 3rd August 1773. See also Harington's *Analysis* Vol I. pp. 349—357.

was removed to Calcutta, and it was proposed that a representative of the Nawab should reside in Calcutta with authority to affix the Nazim's seal to warrants issued for the execution of sentences approved by the law officers of the Nizamut Adawlut. Sudr-ool-Huk Khan was appointed to the *Neeabut* of this branch of the Nizamut, and the President of the Council (Hastings) was asked to "superintend him in the exercise of his office," which he did till 14th April 1775. In October 1775 Reza Khan was appointed Naib Nazim and the Court of Nizamut Adawlut was transferred to Moorshidabad and it was there till 1790 when it was transferred again to Calcutta by Lord Cornwallis.

In 1787 a regulation consisting of twenty-nine articles was enacted and printed for "the administration of justice in the *foujdarry* or criminal Courts in Bengal, Behar and Orissa" (1). The arrangements made on the 6th April 1781 did not contain any modification of, or addition to, the provisions of the Mahomedan law, nor did the Regulation of 27th June 1787 make any change in the substantive criminal law of the Mahomedans. It invested Magistrates with power to take cognizance of petty offences. But as all serious crimes were still exclusively cognoscible by the *Naib Nazim*, as the sentences of the *Nizamut Adawlut* held at Moorshidabad under the superintendence of Nawab Reza Khan were final and not notified to the Government at Calcutta until they had been carried into execution, as the judges and officers of the inferior criminal courts were appointed by the Naib Nazim and removable at his pleasure, and as he possessed an almost exclusive control over those courts and their proceedings, many defects in the Mahomedan law and abuses in the administration of it, were left unremedied, and continued to prevail till the latter part of the year 1790; when three of the important questions discussed by Warren Hastings were settled by Lord Cornwallis. In his Minute recorded on 1st December 1790 Lord Cornwallis remarked "Still the general state of the administration of criminal justice throughout the Provinces is exceedingly and notoriously defective... the evils complained of proceed from two obvious causes—1st The gross defects in the Mahomedan law; and 2ndly. The defects in the constitution of the Courts established for the

(1) Colebrooke's *Supplement*, pp 131—140. The arrangements made in April 1781 for the administration of criminal justice in this Province did not prove satisfactory. For the remarks of the President on those arrangements see Colebrooke's *Digest* pp 128—130.

trial of offenders A provision against the first of these defects cannot otherwise be made than by our correcting such parts of the Mahomedan law as are most evidently contrary to natural justice, and the good of society. That this government is competent to such an amendment of that law, as may appear thus essentially necessary, cannot, I think, admit of a doubt ; since being entrusted with the government of the country, we must be allowed to exercise the means necessary to the object and end of our appointment ; besides that we appear to possess a sufficient legal recognition of the right in question from this, that the alterations made in the established Mahomedan law of the country by the first Code of judicial regulations of 1772, and more particularly that entire alteration, and new and very severe provision therein contained, for the punishment of dacoits, together with the superintendance and control over all the new criminal courts which the said regulations vested in the Company's covenanted servants, stand both fully submitted to Parliament in the sixth report of the Committee of Secrecy as a discretionary act of legislation by the President and Council in the year 1772 ; the Act of the 13th George the Third, Chapter 63rd, and section 7 vests the ordering, management, and government, of all the territorial acquisitions and revenues in the kingdoms of Bengal, Behar and Orissa, in the Governor-General and Council. in like manner to all intents and purposes whatever, as the same now are, or at any time heretofore might have been exercised by the President and Council, or Select Committee, in the said Kingdom. And as it was then before the legislature that the President and Council had interposed, and altered the Criminal law of the country ; such alterations, and all future necessary amendments thereof, appear, by the above clause, to be legally sanctioned and authorized. As we thus appear to possess authority to introduce any necessary amendments in the laws of the country, it is surely incumbent on us not to allow any longer the flagrant abuses in the *Foujdary* department, or exercise of criminal justice, according to the Mahomedan law throughout the Provinces." It is clear from this Minute of Lord Cornwallis that his Lordship wanted to modify both the substantive and adjective Mahomedan criminal law. Lord Cornwallis also remarked that the law laid down by Aboo Haneef that "a murderer is not liable to capital punishment, if he commit the act by strangling, drowning, poisoning, or with a weapon,

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Views of Lord Cornwallis

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such as a stick or club, on which there is no iron ; or by such an instrument as is not usually adopted to the drawing of blood” should be abrogated (1) His Lordship then remarked that the next of kin of the deceased should have no option to remit the sentences of the law and pardon the criminal.

Modification of the Mahomedan criminal law proposed by Lord Cornwallis.

1. Doctrin of Yusuf.
2. Mahommed to prevail over. Haneef

His Lordship therefore proposed :—

- (1) That the doctrine of Yusuf and Mahommed, in respect of trials for murder, be the general rule for the officers of the Courts to write the *futwas* applicable to the circumstances of every trial, or in other words the intention of the criminal, either evidently or fairly inferable from the nature and circumstances of the case, and not the manner or instrument of perpetration do constitute the rule for determining the punishment
- (2) That the relations in future be debarred from pardoning the offender ;
- (3) Where the Mahomedan law prescribes amputation of legs and arms, or cruel mutilation, we ought to substitute temporary hard labour, or fine, and imprisonment, according to the circumstances of the case . That a rule should be made for allowing dacoits, and other criminals, to become witnesses against each other, in the manner of King’s evidence in England, care being always taken that no person be ever convicted on the sole testimony of accomplices unless their credit be supported by circumstances ”

In consequence of these recommendations, Regulations were passed which embodied the first two recommendations (2).

Mutilation of limbs was a Mahomedan penalty, and was resorted to in the case of the *dacoits* in the hope of striking

(1) See Harington’s *Analysis* Vol I pp 362, 364. *Minute* of Lord Cornwallis dated 1st December 1790.

(2) §§33 and 34 of Reg of 3rd December 1790 which were rescinded by Regulations of 1791, 1792 and 1793. Reg IX of 1793 §51, provided “No criminal shall suffer the punishment of mutilation If a prisoner shall be sentenced, in conformity to the *futwa* of the law officers, to lose two limbs, instead of being made to undergo such punishment, he shall be imprisoned and kept to hard labour for 14 years , and if any prisoner shall be so sentenced to lose one limb, he shall in lieu of such punishment be imprisoned and kept to hard labour for seven years . The Judges are accordingly directed whenever any criminal shall be sentenced to suffer mutilation, to commute such punishment for imprisonment and hard labour for the

terror into the hearts of the numerous robbers who were devastating the country. *The Calcutta Chronicle* of February 10th, 1789, relates an instance of the punishment of a gang of dacoits found guilty of burglary at a place near Krishnagur, and sent by Francis Redfearn, Esq, to be tried at the Criminal Court at Salkia, on the Western bank of the river, opposite to Calcutta. At 1 o'clock on Sunday, February 15th, fourteen criminals were brought out, to undergo the sentence passed upon them. The horrible scene is thus described —“One of the dacoits was extended upon his back, with a fillet or band covering his mouth, and tied at the back of his head, to prevent his cries being heard by the others, who were witnesses of the fate they were themselves to experience. He was then pinioned to the ground with only his right hand and left leg at liberty. This done, the operator began to amputate the hand. It was performed with an instrument like a carving knife, not at a stroke, but by cutting and hacking round about the wrist, to find out the joint; and in about three minutes the hand was off. The same mode was observed in amputating the foot, at the ankle joint. Both operations took up together from six to eight minutes in performing. After the hand and foot were off, the extremities of the wounded parts were dipped in boiling *ghee*; and then he was left to his fate. The other thirteen were served in the same manner; yet, what will appear very strange, not one of them expired under the severity of the operation.

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Mahomedan
criminal law
Punishment.
Mutilation.

“The hands and feet of the criminals were thrown into the river. Four of the men have since died; but more from the influence of the sun on the wounded parts, and through want of care, than from the more than savage cruelty of the operation.”

In 1793 a Regulation of Government made it illegal to inflict mutilation, and prescribed imprisonment in lieu of it (1)

On the 3rd December 1790 “a regulation for the administration of justice in the *Faujdary* or Criminal courts in Bengal, Behar and Orissa was passed. Its preamble after

term above prescribed, and to issue their warrant to the Magistrate for that purpose”. These sections embodied the Government Resolution dated 10th October, 1791. See Colebrooke's *Supplement to the Digest*. p. 150.

(1) Reg IX Sec. 51. “No criminal shall suffer the punishment of mutilation. If a prisoner shall be sentenced to lose two limbs, he shall be imprisoned and kept to hard labour for 14 years. If any prisoner shall be so sentenced to lose one limb, he shall be imprisoned and kept to hard labour for seven years”.

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Modification of
Mahomedan
Criminal law.

reciting the steps taken by the President and Council for improving the administration of criminal justice between 1772 to 1790, stated "The numerous robberies, murders and other enormities which have been daily committed throughout the country, evince however that the administration of the criminal justice is still in a very defective state, and as the evils above recited have principally originated from the great delay in bringing offenders to punishment, and to the law not being duly enforced, as well as to defects in the constitution of the Criminal Courts, the Governor-General in Council, with a view to ensure a prompt and impartial administration of the Criminal law, and that all ranks of people may enjoy security of person and property, has resolved to resume the superintendence of the administration of criminal justice throughout the Provinces. The following Regulations have been accordingly enacted." Then the Regulation of 3rd December 1790, was passed. It, amongst other things provided (1) "That the Nizamut Adawlut or the chief Criminal Court, be again removed from Moorshidabad and established at Calcutta. That this Court (instead of being superintended by a native judge, subject to the control of the President of the Board, as heretofore) do consist of the Governor-General and Members of the Supreme Council, assisted by the *Kajec-ool-Koozat*, or head *Kazee* of the provinces and two *Mooftees*. That the Court do exercise all the powers lately vested in the Naib Nazim, as superintendent of the Nizamut Adawlut, leaving the declaration of the law, as applicable to the circumstances of the case, to the *Kazee-ool-Koozat* and *Mooftees*, agreeably to the former practice. That the decisions of the court be in all cases regulated by the Mahomedan law, under the restrictions contained in the Regulations."

Modifications of the Mahomedan criminal law were numerous and important, and were scattered over a large number of Regulations and Acts. They were all repealed by and will be found in Act XVII of 1862. But the provisions of the following may be noted with advantage:—

- (a) *Punishment of mutilation*. Abolished in 1791 and imprisonment and hard labour substituted as noted before (2).

(1) Colebrooke's *Digest* pp. 141—157. Harington's *Analysis* Vol. I. p. 369.

(2) See also the *Extract from the proceedings of the Governor-General in Council*, dated the 10th October 1791 in Colebrooke's *Supplement to the Digest*. p. 159.

(b) *Punishment for murder.* Lord Cornwallis modified the rules of Mahomedan law as noticed before. Lec. VIII

(c) *Punishment for perjury.* The penalties prescribed by the Mahomedan law for false testimony, whether on oath or not, were corporal punishment, imprisonment, and public ignominy ; or as denoted by the technical expression "*tushhee*" "public exposure" but in applying either of these modes of punishment, a discretion was vested in the magistrate as in all cases of "*tazeer*". For the prevalence of perjury in the courts of justice the Governor-General in Council thought it proper that this discretion should be used to check, and deter from, the commission of a crime so dangerous and prejudicial to society and passed Regulation XVII of 1797. Section III of this regulation authorized the Courts of Circuit to order that the words "*deiogh go*" (Perjurer) or such other words should be marked on the forehead of the prisoner, convicted of wilful and corrupt perjury, by the process commonly called "*godna*". This Regulation was rescinded by Reg. II of 1807 which retained this form of punishment but stricter rules were passed. But this kind of punishment was declared unlawful by Act II of 1819 §2, which enacted that after the passing of that Act it should not be lawful for any court or Magistrate within the territories under the Government of the East India Company, to order that any brand or indelible mark of any kind be made, or renewed on any part of the person of any convicted offender or to sentence any offender to be publicly exposed by *Tusheer*, or any other degrading exposure. This Act repealed all Regulations in force in Bombay, Madras and Calcutta, which directed that convicted perjurers should be branded on their foreheads or in other words authorized "*tasheer*."

(d) *Use of Corah prohibited.* The use of *Corah*, as an instrument of punishment in the execution of sentences of any criminal courts was

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prohibited and use of *rallan* substituted by section 4 of Reg. XII of 1825.

(e) *Flogging of Females*. Section 3 of Reg. XII of 1825 exempted females from flogging.

(f) That Regulation (XII of 1825 §7) also restricted the number of cases in which reference to Nizamut Adawlut was necessary.

Thus we see that the regulations modified the Mahomedan criminal law till the passing of the Indian Penal Code which, subject to the provisions of §5 of that Code, superseded all other systems of criminal law. Now let us see how much of Hindu and Mahomedan Substantive Civil Law has been affected by codification. First we shall deal with contract.

Contract.
Presidency towns.

The Statute 21 Geo. III c 70, §17 which gave to Mahomedans and Hindus the right to have matters of contract and dealing between party and party, inheritance, and succession, determined by their laws and usages, was an Act applicable to the Supreme Court at Calcutta. But this right has been taken away by the Indian Contract Act (IX of 1872) and at the present time the Indian Contract Act governs the cases between Mahomedans or Hindus brought before the High Court in the exercise of its original civil jurisdiction (1). There was no legislative provision like that of §17 of 21 Geo. III. c. 70 in force in the rest of the province (2) and the Indian Contract Act contains the rules applicable to the provincial courts. Bengal Regulation III of 1793 §21 directed the judges of the Zilla and City Courts in cases where no specific rule existed, to act according to justice, equity and good conscience. This rule still retains its place in the Bengal Civil Courts Act (XII of 1887 §37) (3).

Bombay and
Madras.

So far as the High Courts in Bombay and Madras are concerned, the Statute of 1797 (37 Geo. III c 142 §13) contained a provision similar to that of 21 Geo. III c.70 §17 for applying Hindu law to Hindus and Mahomedan law to Mahomedans. The Recorders' courts in Madras and Bombay to which the Statute of 1797 applied were superseded by a Supreme Court in Madras in 1799 and in Bombay in 1823. The Charter of the Supreme Court at Madras (§22) and that of the Supreme Court at Bombay (§18) contained

(1) *Madhub v. Rajcoomar* (1874) 14 B. L. R. 76, 83, 81. of *Madhwva v. Venkataramanjulu* (1903) 26 M. 662, 670.

(2) *Nobin v. Ramesh* (1887) 14C 781

(3) See Supra Lec II "Contract".

similar provisions for the application of Hindu and Mahomedan Law. The law or equity administered by the Supreme Courts in Madras and Bombay consisted in the application of Hindu law to Hindus and Mahomedan law to Mahomedans. The Indian Contract Act superseded in those Presidencies also all other laws of contract subject to § 1 of the Contract Act. So far as *Moffusil* cases are concerned, Hindu or Mahomedan law, as such, is not strictly applicable to cases arising from contracts. Such cases must be governed by the rule of "equity and good conscience" based upon the customary law of the land, which in the absence of proof of any special usage or custom will be presumed to be in accordance with the texts of Hindu or Mahomedan law as the case may be (1).

We must remember that the Indian Contract Act is not exhaustive and in cases not provided for in that Act or other legislative enactments relating to particular contracts, the High Courts in the exercise of their original jurisdiction, are still to apply the Hindu law of contract to Hindus and the Mahomedan law of contract to Mahomedans. This is because of the provisions of the Charters of those courts, in which the direction in this respect of the Statutes of 1781 and 1797 have been continued. Thus we find that the rule of the Hindu law of contract known as *Damduput* (2), according to which interest exceeding the amount of principal cannot be recovered at any time is still in force in the Presidency Towns (3) of Calcutta, Madras and Bombay (4). This rule does not apply to suits brought in the *Moffusil* courts in Bengal (5).

Bombay High Court has held that neither the Interest Act nor the Indian Contract Act affects the rule of Hindu law that in the case of a debt wrongfully withheld after demand of payment has been made, interest becomes payable from the date of demand by way of damages, that that law was in force when the Interest Act was passed and under the proviso to that Act it has continued to be in force. The Indian Contract Act has not interfered with that law (6).

(1) *Ismail Kani v. Nazar Ali* (1903) 27M 211, 214.

(2) *Manu* VIII. 151 Colebrooke's *Digest of Hindu Law* Bk. I C. 2. Stokes' *Hindu Law* pp. 110—113.

(3) *Nobin v. Romesh* (1887) 14 C. 781, 789. *Umacharan v. Sreebomath* 1 C. W. N. (short notes) CLXXVIII. *Ananji v. Raghubai* (1871) 6 M. II. C. R. 400. Ghose on *Mortgage* 3rd Ed. pp. 589, 590.

(4) *Gopal v. Gangaram* (1895) 20 B 721, 725.

(5) *Deen Doyal v. Kylash* (1875) 1 C. 92.

(6) *Saundannappa v. Shivbaswa* (1907) 31 B 351 S. C. 9 Bom L. R. 439. Compare *Thakur Ganesh v. Thakur Harihar* (1901) 31 I. A. 116.

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Inheritance and
Succession.

Substantive portion of Hindu and Mahomedan law of inheritance and succession has been left practically untouched by the Anglo-Indian Legislators. I say practically because the British Indian Administrators did alter the rules of those systems when they thought that it was just and equitable to make any change e.g. *The Caste Disabilities Removal Act* (XXI of 1850) Throughout the whole legal history of British India one important principle has always been recognised by the legislators and that principle is to combine the utmost possible respect for Native opinions and institutions, with a gradual improvement of those institutions and their adaptation to changing circumstances (1).

Caste Disabilities
Removal Act.

Section 9 of Bengal Regulation VII of 1832 declared "when one party shall be of the Hindu and the other of the Mahomedan persuasion, or where one or other of the parties to the suit shall not be either of the Mahomedan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled" The principle of this section was extended throughout the territories subject to the East India Company by Act XXI of 1850 (*Caste Disabilities Removal Act*) By declaring that the Hindu or Mahomedan law shall not be permitted to deprive any party not belonging to either of those persuasions of a right to property or that any law or usage which inflicts forfeiture of rights or property by reason of any person renouncing his or her religion, shall not be enforced, the legislature virtually set aside the provisions of the Hindu law which penalises renunciation of religion or exclusion from caste (2)

Indian Succession
Act. (X of 1865).

Provisions of section 2 of the Indian Succession Act show that the Act is of universal application in this country unless a person claiming to be excepted can show that he is specifically excepted from the operation of its provisions. The words "applicable to all cases" in §2 operate as a repeal of the previously existing law and that subject to the exception in the section the Courts must look to this Act and this alone for the law of British India applicable to all cases of testamentary and intestate succession. The burden therefore is upon the plaintiff to prove the exception within which his case falls. A Hindu who has embraced Christianity and

(1) *Per* Sir James Stephen, *Abstracts of Proceedings* 21st January 1870.

(2) *Khunni Lal v. Kunwar Gobind* (1911) 13 C. I. J 575—582 (P. C.)

continues to be a Christian up to the time of his death is not a Hindu within the meaning of §331 of the Indian Succession Act. It is not sufficient to bring a man within the definition of Hindu to prove his Hindu birth and origin. It is also essential that he should be a Hindu at the time when the question in issue arises e.g. if there is a dispute as to the succession to the estate of the deceased person, it must be proved that he was a Hindu at the time of his death. No doubt under the law as it stood before the Indian Succession Act, a Hindu after his conversion to Christianity might by his conduct show by what law he intended to be governed in matters succession and inheritance, because as observed by their Lordships of the Judicial Committee (1) "Upon the conversion of a Hindu to Christianity the Hindu law ceases to have any continuing obligatory force upon the convert, he might renounce the old law by which he was bound as he had renounced his old religion or if he thought fit, he might abide by the old law notwithstanding he had renounced the old religion." In view, however of the provisions of §§2 and 331 of the Indian Succession Act, this position can no longer be maintained. Thus the law at the present time is that when a Hindu embraces Christianity and continues to be a Christian up to the time of his death, all questions of succession to his estate upon intestacy must be determined by the Indian Succession Act (2).

Section 82 of the Indian Succession Act applies to Hindu Wills and has the effect of partially abrogating the rule of Hindu law that a gift by the husband of immoveable property to the wife without express words creating an absolute estate, conveys only a limited interest. The rule of Hindu law referred to above is based upon a text attributed to *Narada* cited in the *Dayabhaga*, Ch IV, Sec. I, 23 and is limited to the case of gift of immoveable property to the wife. Thus here we find another instance where codification has affected a rule of Hindu Law (3).

Indian Succession Act §82

The whole law of wills among Hindus is of recent origin being mainly a development by judicial decisions of the Hindu Law of Gifts. The reason for such development was the necessity felt for making this part of the personal law of

(1) *Abraham v. Abraham* (1863) 9 M. T. A. 195.

(2) *Nepembala v. Sitikanta* (1910) 15 C. W. N. 158, 160, 161.

(3) *Bhaba Tarini v. Peary* (1897) 24 C. 646, 650. About daughter's estate see *Radha Prasad v. Ranimoni* (1908) 35 I. A. 118, 129.

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Hindu Wills

Hindus suitable to the modern exigencies of their society. In these judicial decisions the judges decided or attempted to decide the cases according to the principles of Hindu Law. I say *attempted* to decide because in some of these cases the rules of Hindu Law for some reason or other were not followed. Thus a few years ago the question "whether the birth of a son revokes a Hindu will" came up before the Madras High Court. The case originally came up before a Bench composed of Mr Justice Subrahmania Aiyar and Mr Justice Moore, and Mr. Justice Aiyar, differing from Mr Justice Moore, held (1) that the birth of a son to a Hindu after the making of a will disposing of all his self-acquired properties, had the effect of revoking the will if its effect is to leave the son unprovided for thereby, provided the omission to provide for the son is not intentional. "It is sufficient to point out" says Aiyar J. "that in laying down that a widow *prima facie* takes only a limited interest under a grant or devise by her husband (2) the courts were altogether influenced by the fact that the general feeling of the community is against women being given absolute powers of alienation and thus being enabled to divert the devolution of the property from the family. Bearing, therefore, in mind the extreme importance attached to the existence of male issue by every Hindu on religious and other grounds and the unlikelihood as a rule of a Hindu father contemplating the total disinheritance of his son even with reference to his self-acquired property, it would seem to be quite a reasonable doctrine to lay down that in the circumstances like those of the present case the will is revoked in point of law by the birth of male issue to the testator subsequent to the making of the will. No Indian authority directly supporting such a view was, however, cited; nor am I aware of any; but this lack of precedent is not surprising since the Hindu law of wills is of very recent growth."

But on appeal (Sir Charles White C.J., Benson and Miller JJ.) this decision was upset on the ground that §57 of the Succession Act is exhaustive, and read with §3 of the Hindu Wills Act, it means that Hindu Wills should not be revoked except in the manner mentioned in §57 of the Succession Act subject to the proviso contained in §3 of the Hindu Wills Act (3). Thus we find that an implied provi-

(1) *Subba Reddi v. Doraisami* (1906) 16 M. L. J. 491.

(2) Compare. *Bhaba Tarini v. Peary* (1897) 24 C. 650, 651.

(3) *Subba Reddi v. Doraisami* (1907) 17 M. L. J. 257.

sion of Hindu Law has been done away with by the Indian I,rc. VIII Succession Act.

Marriage. This branch of Hindu and Mahomedan Law has not been touched by the British Indian administrators, except in such parts of it, where it was incumbent on them on moral and equitable grounds to alter it. The following is the list of enactments relating to this branch of Hindu and Mahomedan Law viz:—

- (a) *Abolition of Sati* (Reg. XVII of 1829)
- (b) *Hindu Widows Remarriage Act* (XV of 1856)
- (c) *Native Converts Marriage Dissolution Act* (XXI of 1866).
- (d) *Civil Marriage Act* (III of 1872)
- (e) *The Indian Criminal Law Amendment Act* (X of 1891).
- (f) *Marriage Act of certain Malabar Hindus* (Mad. Act IV of 1896)
- (g) *Anand Marriage Act* (Act VII of 1900).

The preamble of the first two enactments clearly shows that those enactments were made not merely because the British Indian administrators thought it just and equitable to make the change, but because they wanted to make the rules of Hindu Law on this branch, consistent with the true interpretation of the precepts of Hindu religion. "The practice of *Suttee*" runs the preamble of Reg. XVII of 1829 "is revolting to the feeling of human nature; it is nowhere enjoined by the religion of the Hindus as an imperative duty, on the contrary, a life of purity and retirement on the part of the widow is more especially and preferably inculcated, and by a vast majority of that people throughout India the practice is not kept up nor observed; in some extensive districts it does not exist; in those in which it has been most frequent, it is notorious that, in many instances, acts of atrocity have been perpetrated, which have been shocking to the Hindus themselves, and in their eyes unlawful and wicked. . . . Actuated by these considerations the Governor-General in Council, without intending to depart from one of the first and most important principles of the system of British Government in India, that all classes of the people be secure in the observance of their religious usages, so long as that system can be adhered to without violation of the paramount dictates of justice and humanity, has deemed it right to establish the following rules". Then follow five sections of the Regulation.

The preamble of Act XV of 1856 says, amongst other

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things "many Hindus believe that this imputed legal incapacity (to contract a second valid marriage), although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the courts of justice shall no longer prevent those Hindus who may be so minded from adopting a different custom, in accordance with the dictates of their own conscience ; and whereas it is just to relieve all such Hindus from this legal incapacity of which they complain, and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare ; it is enacted as follows."

Thus we see that some of the rules of Hindu marriage law have been affected by legislation. But both the Legislatures and the Judges are unwilling to touch the marriage laws of Hindus, Mahomedans and the Buddhists (1).

Guardians and Wards.

Act VIII of 1890 (Guardians and Wards Act) is a complete code defining the rights and remedies of wards and guardians. The intention of the Legislature is, as held by Allahabad High Court, that all questions touching the relations of guardians and wards should be disposed of by proceedings under the provisions of this Act (2).

The Indian Majority Act

The Indian Majority Act (3) has affected the rules of Hindu law on the subject according to which, youths belonging to any of the three superior classes, ceased to be minors upon their ending their "studentship" and returning home from their preceptors. Sudra youths attained their majority upon completing sixteenth year (4).

Under the Mahomedan law all persons, whether male or female, are considered minors, until after the expiration of the sixteenth year, unless symptoms of puberty appear at an earlier period (5).

The Indian Majority Act (IX of 1875) was passed for the purpose of prolonging the period of nonage and attaining more *uniformity* and *certainly* respecting the age of majority in the case of persons domiciled in British India

Under §3 of Act XV of 1856 (Hindu Widows Remarriage Act) the court has a discretion to remove a Hindu

(1) *Mi Me v. Mi Shwe* (1912) 16 C. W. N. 529.

(2) *Sham Lal v. Bindo* (1904) 26 A. 594, 597 *Mahadeo v. Bindsri* (1908) 30 A. 137.

(3) Act IX of 1875

(4) *Manu*, Ch. VIII 27. *Strange on Hindu Law*. Vol. I p. 72.

(5) *Macnaghten's Principles of Mahomedan Law* Ch VIII. 4th Ed. p. 62.

mother from the office of guardian of the children by her first marriage when she has remarried. But the exercise of such discretion must be regarded from the point of view of the welfare of the infants (1).

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II. Adjective Law. In British India the procedural portion of law is entirely statutory. Act V of 1908 (Civil Procedure Code) consolidates and amends the laws relating to the procedure of the courts of civil judicature. Its provisions generally extend to the whole of British India except the Scheduled Districts (2).

II. Adjective Law.

Civil Judicature

Section 45 of the Indian Divorce Act enacts "subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure." But the Civil Procedure Code cannot be "applied wholesale to the court when exercising divorce jurisdiction" (3). There is much in the Code of Civil Procedure which deals with substantive law and not procedure and those portions of the Civil Procedure Code (e.g. Order XXXVIII r1 5, 6) have no application in divorce proceedings (4).

Divorce.

With the Hindu or Mahomedan administration procedure the courts of British India have nothing directly to do. Administration procedure is now governed by the Probate and Administration Act of 1881, but it was not till 1880 that the operation of that Act became territorially almost co-extensive with British India. "Sectionally" says Sir Roland Wilson (5) "it applies to all Muhammadans, as well as to all Hindus, Buddhists and other persons exempted from the Indian Succession Act; but while it reproduces most of the provisions of that Act which relate to the granting of probate and letters of administration and to the powers and duties of executors and administrators, it contains nothing corresponding to the important §§187 and 190, which enact that no right as executor or legatee can be established in any court of justice without probate of the will under which the right is claimed, and that no right to any part of the property of a person who has died intestate can be established without letters of administration."

Succession and Inheritance.

The constitution, jurisdiction and procedure of criminal courts in British India are regulated by the Code of Criminal Procedure (V of 1898). The process of superseding native

Criminal Procedure.

(1) *Gunga v. Jhalo* (1911) 15 C. W. N. 579.

(2) Act V of 1908 §1 (3).

(3) *Phillips v. Phillips* (1910) 37 C. 613, 616

(4) *Ibid*

(5) *Digest of Mahomedan Law* 3rd Ed p. 230.

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by European law, so far as the administration of criminal justice is concerned, was partially done by the Criminal Procedure Code of 1861 and was completed by the passing of the Evidence Act of 1872.

Evidence.

The English rules of evidence were always followed in the courts established by the Royal Charter in the Presidency Towns while in the moffusil, as noticed before, the Mahomedan law of evidence was not the law ; those courts were not bound to follow the rules of English law of evidence, but there was nothing to prevent them from doing so. But at the present the Indian Evidence Act contains most of the rules of evidence and supercedes all other rules of evidence whether Hindu or Mahomedan. It is based on the English law of evidence modified to suit the people of this country. With a few exceptions this Act was intended to, and did, in fact, consolidate the English law of evidence (1). Before the passing of the Evidence Act (I of 1872) some Judges admitted all kinds of evidence, others tried to regulate their proceedings by so much of the English law as they had been able to pick up by a study of some of the many voluminous treatises published on the subject. The result was a general diversity of practice, and the want of some fixed principles which should guide all the courts had long been felt (2). Referring to this state of things the then Lieutenant-Governor of Bengal remarked " there was clearly a necessity to provide against the base, bastard caricature of English law which the lawyers were inclined to impose on the courts in this country" (3).

Presumption of death.

The question whether a person is to be presumed to be dead, is one of evidence, and not a part of the substantive law of inheritance (4) Before the passing of the Indian Evidence Act of 1872 the rule of English law, that a period of seven years absence without tidings is sufficient to raise a presumption of death, was not applicable in the case of a Hindu. The rule of Hindu Law, requiring the lapse of 12 years before an absent person of whom nothing had been heard could be presumed to be dead, was applicable to such a case (5) Amongst the Mahomedans different periods were prescribed by different schools, after which death might

(1) *Gujju Lal v. Fateh Lall* (1880) 6 C 171, 188. *Smith v Ludha* (1892) 17 B 129, 141.

(2) *Abstracts of the proceedings* (1871) p 150.

(3) *Ibid*, p 476

(4) *Dhondo v Ganesh* (1886) 11 B 433, 435

(5) *Janmajoy v. Keshub* (1868) 2 B. L. R. A. C J 131. *Gurudas v. Matulal* (1870) 6 B. L. R. Ap. 16

be presumed (1) Now the rules contained in §§107—109 of the Indian Evidence Act have done away with the rules of Hindu and Mahomedan law, and govern both Hindus (2) and Mahomedans (3). LEC VIII

Under Hindu Law suits for the recovery of debt or other personal matters had to be brought within 10 years (4) Thus where the defendant's father executed a writing for fifty rupees payable in a month, in 1798 and lived till 1802 without any demand having been made upon him for payment and after the death of the defendant's father in 1802 the defendant was sued for the recovery of the amount, it was decided that the suit was maintainable as it was instituted within 10 years of the date of the contract (5) The period of 10 years was the "shortest limit of action known to Hindu Law" (6) "If one sees his land in the possession of another and say nothing it is lost after twenty years; moveables after ten years" (7) Limitation.
Hindu Law.

The old theory of Mahomedan law was that a person's right would not be lost because of lapse of time and that it was incumbent on the *Qādi* to hear his claim (8). Law of Limitation is unknown to the Mahomedan law either as regards debts or dower or any other claim. But rule 15 of the Plan of Warren Hastings recited "by the Mahomedan law, all claims which have lain dormant for twelve years, whether for land or money, are invalid: this also is the law of the Hindus, and the legal practice of the country" and prescribed 12 years as the period of limitation. This provision was followed in and re-enacted by §19 of the Judicial Regulation passed on the 11th April 1780, by §20 of the Judicial Regulation passed on the 5th July 1781; also by

(1) According to old *Hanan* doctrine, ninety years should have elapsed from the date of the birth of the missing person before his death could be presumed. According to *Maliki* principle, if a person be unheard of for four years, his death will be presumed. Among the *Shuhs* the period is 10 years and among the *Shatees*, seven. *Hedava*. Book XIII.

(2) *Dhondo v. Ganesh* (1886) 11 B. 133. *Balavya v. Kistnappa* (1888) 11 M. 118. *Dharup v. Govind* (1886) 8 A. 611.

(3) *Moolla Cassim v. Moolla Abdul* (1905) 10 C. W. N. 33, 15 M. L. J. 317.

(4) *Colebrooke's Digest of Hindu Law*, Vol. I. 185. *Strange's Hindu Law*, Vol. I. p. 308.

(5) *Samy Kesogee v. Gooly Cunnun* (1807) *Strange's Hindu Law*, Vol. II. p. 477.

(6) *Jagannath's Digest* Bk. I. 113. *Strange's Hindu Law* Vol. II. p. 477. See also West and Buhler's *Hindu Law* (3rd Ed.) Bk. II. §4 D. 2. p. 692 note (b).

(7) *Yajurvedhya* II. 23, 24. *Macnaghten's Hindu Law* Vol. II. According to *Macnaghten* twenty years adverse possession deprives the owner only of the profits of the property. *Lalubhai v. Bai Amrit* (1877) 2 B. 299, 307, 309. See also *Tagore Lectures* for 1882. 21—28.

(8) See Mr. Justice *Rahim's Tagore Lectures* for 1907. p. 374.

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§14 of Regulation III of 1793 ; §8 Reg VII of 1795 and §18 Reg II of 1803 But it was subsequently found that the observation about the rules of Hindu and Mahomedan Law in Rule 15 of the Plan of Warren Hastings was not correct and the period of limitation fixed by that Rule and followed in subsequent Regulations was not in accordance with the rules of Hindu and Mahomedan Law, though it was consistent with the "legal practice of the country." In the preamble of Regulation II of 1805 it was stated that the Rule 15 of the Plan of Warren Hastings was in force for above 30 years and that "it was thought improper to abrogate it ." Thus we find that the Regulations and Acts passed by the British Indian Legislatures govern the Mahomedans though Mahomedan law knows nothing about the law of limitation We also find that the different periods fixed by the different British Indian enactments are not the same as those prescribed by Hindu Law.

Revenue Procedure

"The history of revenue administration" says the Rev. Mr. Firminger (1) "is the backbone of the history of Bengal under English rule. . . Neither Plassey nor Buxar was fought to win territorial sovereignty for the East India Company or the British Crown. The growth of a rural administration is the secret of the expansion of English influence in Bengal." Revenue administration is intimately connected with administration of justice (2) and a rural administration includes administration both of justice and of revenue. The doctrine of justice, equity and good conscience, as we have noticed before moulded and shaped the course of administration of justice and revenue business, and it is still exercising a great influence on both kinds of administration. It is an interesting and instructive study to trace the influence of this doctrine on the general history of Bengal at the end of the 18th century. This study really forms a part of physiology of history of Bengal and can be made only from the old regulations, consultations and proceedings of the Committee of Circuit, Reports from the District officers and the proceedings of the Governor-General and his Council. In Lecture III I have dealt with this matter and I shall now pass on and show how the doctrine of equity, justice and good conscience shape the course of ad-

(1) "*The Old District Records of Bengal.*" A paper read before the Indian section of the Royal Society of Arts, on January 18, 1912.

(2) *Letter from the President and Council to the Court of Directors*, dated 3rd November 1772. See Harington's *Analysis*, Vol. II p. 10.

ministration of the country. True, the Company did not like to make any change, if possible, in the laws of the country and every *zamindere* and every *lalook* was left to its own particular customs. But these were not inviolably adhered to, the novelty of the business to those who were appointed to superintend it, the accidental exigencies of each district, and "*not unfrequently the just discernment of the Collector, occasioned many changes*" (1)

Now, what was this "just discernment" of the Collectors? It was nothing but their own views regarding any point of law, which were naturally based on the rules of English law. The British Collectors of revenue, guided by the doctrine of justice, equity and good conscience, unwittingly introduced the rules of English law and shaped the course of administration of the country. The result was that the exactions of the zaminders and great farmers of revenue were stopped to a certain extent. "The security of private property is the greatest encouragement to industry, on which the wealth of every state depends. The limitation of the powers annexed to magistracy, the suppression of every usurpation of them by private authority, and the facilitating of the access to justice were the only means by which such a security could be obtained; but this was impossible under the circumstances which had hitherto prevailed. While the *Nizamut* and the *Dewanny* were in different hands, and all the rights of the former were admitted; the Courts of Justice, which were the sole province of the Nazim, though constituted for the general relief of subjects, could receive no reformation." But as we have noticed before that this state of things began to change when the actual administration of the country was taken up by the Company.

According to Hindu Law the sovereign is not the proprietor of the soil. He is entitled to a share of the produce of the land in the occupation of his subjects, because a share is payable to him as the price for the protection afforded to life, liberty and property (2). When the Mahomedans came to India they wanted to do away with the rules of Hindu Law, but however much they hated any rules or principles except those laid down in the Koran, they were compelled in India to accept, in many cases, the ancient Hindu principles.

Hindu Law.

(1) *Remarks of the President and Council to the Court of Directors.* Dated 3rd November 1772

(2) *Narada Smriti*, Ch. XVIII. Ver. 48. *Sacred Books of the East* Vol. XXXIII p. 221. *Manu* Ch. VII Ver. 130 Ch. X Ver. 120; Ch. X. Ver. 118 *Apastamba*. Ch. II. 10. 26. 9.

LÆC. VIII

Mahomedan Law

I say the Mahomedan Emperors were compelled to accept the principles of Hindu law on this subject because their doctrines of fiscal system were not fully developed. According to Mahomedan jurisprudence the Mahomedan conqueror is the proprietor of the land and according to Abu Yusoof *Khijaj* should be levied as a punishment, the land being considered forfeited for infidelity. In India *Khijaj* was soon commuted into money rent. The result of this change was that the king was entitled only to rent and when rent was once fixed there was no doctrine of increase from the unearned increment, and the king's right was fixed for ever. The customary rent which had prevailed at the time of the Hindu kings was superseded and a new custom in increased proportion was established (1). The important enactments in this branch of law are (i) the *Bengal Land Revenue Sales Act* (XI of 1859) as supplemented by Ben. Act III of 1862; Ben. Act VII of 1868; Ben. Act I of 1895 and amended by Act XIV of 1870; Ben. Act III of 1881, and XII of 1891; (ii) *Public Demands Recovery Act* (Beng. Act VII of 1880).

Revenue Sale Laws.

"The general policy of the Revenue Sale Laws" says Sir James Colville (2) "that have been passed since the Perpetual Settlement, has been to protect the public revenue by placing the purchaser of an estate sold for arrears of revenue in the position of the person who, at the time of the Decennial settlement, engaged to pay the revenue then fixed. They, therefore, gave or sought to give to the purchaser the power of abrogating all engagements made by the defaulting Zemindar or his predecessors since the settlement, whereby the Zemindary rents and profits, which were the security to Government for the due payment of its revenue, were diminished. The Indian Legislature, however, has not uniformly tried to effect this general object by precisely the same means. The various Regulations and Acts which it has from time to time passed for the purpose differ in the language of their provisions, and in the stringency of the powers conferred by them." "Act XI of 1859 was an amending Act. It was passed, as appears from the title and preamble, in order to improve the law relating to sales of lands for arrears of revenue. The machinery and procedure

(1) For origin of rent in India see *Thakurane v. Bisheshu* (1865) B. L. R. Sup. Vol. 202, 3 W. R. (Act X) 29, otherwise known as the Great rent case in which it was held that there was nothing like competition rent in India. Theories of Mill and Malthus were also discussed.

(2) *Khajah Assanoollah v. Obhoy* (1870) 13 M. I. A., 317, 323

adopted in the Act for the most part were old, but provisions were introduced in order to give greater protection to persons interested in land subject to Government revenue against the loss of their property through their agents' fraud or their own inadvertence" (1) This Act is to a great extent a remedial Act passed for the benefit of the subject, and in order to relax the stringency of the former statutes, whereby the Crown was empowered to sell estates for non-payment of revenue (2).

Lxc VIII

It has at no time been attempted by the Legislature to place demands in respect of cess on the same footing as revenue demands to which Act XI of 1850 applies. They have been always kept carefully separate in legislation, although the absolute powers of the Collector under §6 have been, habitually under administrative orders from the Board of Revenue, used to enforce payment of cess demands amongst others (3).

Revenue demands and Demands in respect of Cess.

The clauses of Act XI of 1850 in so far as they relate to sales or to their challenge at the instance of the proprietor, as well as the provisions of §3 of Bengal Act VII of 1868 are framed upon the express footing that they are to be applicable to the sale of estates which are in arrears of duty. The enactments of 1850 and 1868 are obviously intended to apply to cases in which if the irregularity or illegality of the sale proceedings alleged by the objector be negatived, the sale will remain valid (4).

Bengal

The following Regulations deal with the question of assessment of land Revenue :—Beng. Reg. VIII of 1793 §§34—41, 43; Beng. Reg. II of 1810 §§3, 5—23; Beng. Reg. IX of 1825 and Act IX of 1847; Act XXXI of 1858 §§1, 2.

Assessment of Land Revenue generally.

Act XXIII of 1850 (§§3—7) deals with the procedure for recovery of land revenue in Calcutta.

Calcutta.

Bombay Act V of 1879 deals with the subject of assessment and collection of land revenue generally in Bombay Presidency. Act XI of 1852 §2 provides for the appointment of Commissioners to enquire into the claims to hold land free from payment of revenue.

Bombay Presidency

Assessment and collection of land revenue in Bombay city are governed by Bombay Act II of 1876 and Bombay Act I of 1910.

Bombay City.

(1) *Rajah Gobind v. Ramjanam* (1893) 20 I. A. 165, 172.

(2) *Bunwatee v. Mohabeer* (1873) 1 I. A. 39, 103.

(3) *Gujraj v. Secretary of State* (1889) 17 C. 414, 431

(4) *Balkishen v. Simpson* (1898) 25 I. A. 151, 158.

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Lower Burma.

In Lower Burma, Act II of 1876 and Bur Act IV of 1898 govern the subject of assessment and collection of land revenue. Reg. IX of 1874 (§§10, 11, 13, 14) deals with the assessment of measured land in the plains, tax on *loungyas* &c.

Upper Burma.

In Upper Burma, Reg III of 1889 and Burma Act I of 1910 contain the law on this subject.

Central Provinces

In the Central Provinces, Act XVIII of 1881 contains the law on this subject

Coorg.

In Coorg Reg I of 1899 governs such cases.

Ajmere.

In Ajmere the law is contained in Reg. II of 1877.

Madras (except the city of Madras).

Assessment of land revenue governed by Mad. Reg. II of 1803 §§ 16—18, 38—40 ; Mad. Act II of 1864 ; Mad. Act I of 1876. On the subject of collection of land revenue, there are several enactments e.g Mad Reg. XXV of 1802 (Madras Permanent Settlement Regulation), Mad. Regs. I and II of 1803 ; Mad. Act II of 1864 ; Mad. Act III of 1896 ; Mad. Act I of 1902 and Mad. Act I of 1909.

In Madras city Act XII of 1851 and Mad. Act VI of 1867 contain the law on this subject.

N.-W. Frontier Province and the Punjab.

Assessment and collection of land revenue in N.-W Frontier Province and the Punjab, are governed by Act XVII of 1887.

The United Provinces.

U. P. Act III of 1901 and the Benares Permanent Settlement Regulations (Reg. I of 1795 and Reg XXVII of 1795) contain the law on the subject in the United Provinces.

Conclusion.

To sum up : A Penal Code, a Contract Act, a Transfer of Property Act, a Trust Act, a Negotiable Instruments Act, an Easements Act, a Factories Act, a Lunacy Act, a Companies Act, an Evidence Act, a Limitation Act, a Registration Act and Civil and Criminal Procedure Codes, to say nothing of the provincial land revenue and tenancy Acts, cover a large field of substantive and adjective law, which has already undergone codification. In preparing these codes, Macaulay's principle "Uniformity when you can have it, diversity when you must have it, but in all cases certainty" has been steadily kept in view by the Anglo-Indian codifiers. No legislation can be perfect, and perfection of any sort can not be claimed for the Anglo-Indian Codes, but what can be claimed for them is that they have been a great boon to the Courts, that they have reduced the provisions of the law on the subjects with which they deal into a comparatively narrow compass, and that they are for the most part free from ambiguity and are easily intelligible by the ordinary

lay mind. Now, the question arises whether other branches of civil law in this country may not be systematized and codified or in other words whether further codification is feasible in British India and this will be the subject matter of our next Lecture.

LECTURE IX.

FEASIBILITY OF FURTHER CODIFICATION IN BRITISH INDIA.

Rise of new
interests and new
circumstances and
codification.

Maine's minute
Dt. 17th July
1879.

Rise of new interests and new circumstances in the progress of society brings in new questions of law, questions answers to which cannot be found in the existing Codes. Such questions must be decided one way or another, sooner or later either by the Legislature of the country or by the judiciary. If the legislature does not legislate, the courts of justice will have to legislate, for legislation perpetually goes on through some organ or another wherever there is a civilized government, and it cannot be stopped. We have already noticed the evils of judge-made law. "But" says Sir Henry Maine (1) "legislation by Indian Judges has all the drawbacks of judicial legislation elsewhere, and a great many more. As in other countries, it is legislation by a legislature which, from the nature of the case, is debarred from steadily keeping in view the standard of general expediency. As in other countries, it is haphazard, inordinately dilatory, and inordinately expensive, the cost of it falling almost exclusively on the litigants. But in India judicial legislation is, besides, in the long run, legislation by foreigners, who are under the thralldom of precedents and analogies belonging to a foreign law, developed thousands of miles away, under a different climate and for a different civilization." This minute was written by Sir Henry Maine when he was consulted by the India Office on the subject of Indian Codification. Sir James Stephen was also consulted at the same time on the subject Sir James Stephen gave his opinion in his minute dated July 2, 1879, in which he stated that the general plan of operation should be to pass into law a certain number of enactments, but that the proposal to arrange them scientifically should be laid aside. According to his view the Indian Code should consist of the following enactments · I. Substantive law. (a) The Penal Code. (b) The law of Contract, enlarged by Chapters on Contracts relating to land, contracts relating to Shipping and Negotiable Instruments and if required the Contracts of service, carriage and some other kinds of contract. (c) The Law of Torts or Actionable wrongs.

(1) *Minute of Sir Henry Maine.* Dated 17th July 1879

(d) The Indian Succession Act. II. Procedure. (e) The Code of Civil Procedure. (f) The Code of Criminal Procedure. (g) The Evidence Act (h) The Limitation Act. (i) The Specific Relief Act. LÆC. IX

He would not attempt to make these Acts or any of them into a single body of law to be called the Indian Civil Code. Sir Henry Maine concurred with Sir James Stephen in considering that a provisional convenience was the utmost that could be claimed for the method of "Scientific" arrangement. There is but one way of forming a civil code (either consistent with common sense or that has been ever practised in any country) namely that of gradually building up the law, in proportion as the facts arise which it is to regulate (1). This is exactly what is happening in this country, and the work of codification has been going on for the last hundred years. Besides the codes mentioned by Sir James Stephen we have now got the Transfer of Property Act, the Negotiable Instruments Act, the Easements Act, the Trust Act, the Factories Act, the Lunacy Act, the Life Assurance Companies Act &c. &c. True, perfection of any sort cannot be claimed for any one of these codes, but what can be claimed for them is that they have been a great boon to the Courts, that they have reduced the provisions of the law on the subjects with which they deal into a comparatively narrow compass. Now the question arises whether the work of Codification can be extended still further and whether other branches of civil law may be codified. Indian Civil Code.

When we remember that Lord Macaulay and his coadjutors, in their letter dated the 14th October 1837 stated "no part of the law can be brought to perfection while the other parts remain crude," when we remember that it is the settled policy of Parliament and also of the Indian Government, that a complete Substantive Civil Code is to be given to India and when we see that there has been very little codification in this country during the last 30 years, we may naturally ask for the reason of such slow progress. "To all appearance, the Indian Government has at last yielded to influences resembling those which in India pigeon-holed the Penal Code for more than twenty years" (2) Now let us enquire into the causes which led to the suspension of Codification in British India.

(1) Lord Mackenzie's *Discourse on the Study of the Law of Nature and Nations*.

(2) Stokes' *Anglo-Indian Codes* Vol. I. p. 20.

L.EC. IX

Sir C. P. Ilbert mentions three such causes (a) Apprehension of overlegislation. (b) Judges' and other officials' objection that the whole of their time is absorbed in criticising new Bills and learning new Acts. (c) The objection of India being made the subject of legislative experiments of questionable utility and unquestionable costs (1).

(a) Apprehension of over-legislation.

In the history of codification in this country there is one very prominent fact, and that is that whenever there was an attempt at codification there was the cry of overlegislation. The cry in this specific form was raised when some of the most important Anglo-Indian Codes e.g. the Penal Code, the Procedure Codes, the Indian Succession Act, the Hindu Wills Act, the Indian Divorce Act, the Indian Evidence Act and the Indian Contract Act were passed by the Indian Legislature. But this objection took a different form when Bombay Reg. XIV of 1827 consolidated the criminal law of Bombay and Lord Macaulay and his colleagues drafted their letter to Lord Auckland in 1837. Then the apprehension was that codification would offend the susceptibilities of the people for whose benefit the Codes were passed. Referring to this objection Lord Macaulay remarked "The Government of that Presidency appears to have been fully sensible to the great advantage which must arise from placing the whole law in a written form before those who are to administer and those who are to obey it; and whatever may be the imperfections of the execution, high praise is due to the design. The course which we recommend to the Government, and *which some persons may perhaps consider as too daring*, has already been tried at Bombay, and *has not produced any of those effects which timid minds are disposed to anticipate even from the most reasonable and useful innovations*. Throughout a large territory, inhabited to a great extent by a newly conquered population, all the ancient systems of penal law were at once superseded by a Code, and this without the smallest sign of discontent among the people" (2).

If we analyse the cry of apprehension of over-legislation we shall find that this apprehension of wounding the susceptibilities of the people of British India is at the bottom of it. This cry of over-legislation, as we have already noticed, led to temporary cessation of codification in this country at the time when Lord Hobhouse succeeded

(1) *Legislative Methods and Forms* p. 146.

(2) *Letter from Lord Macaulay and other members of the First Law Commission to Lord Auckland* dated 14th Oct. 1837, §7.

Sir James Stephen as the Law Member in 1872. After ten years in 1881 and 1882 when the Probate and Administration Act, the Easements Act, the Negotiable Instruments Act, the Trust Act and the Transfer of Property Act were passed the cry of over-legislation which had been raised ten years previously was raised in an intenser form. When Sir C. P. Ilbert succeeded Dr. Whitley Stokes as the Law Member of the Governor-General's Council he also received strong hints that it would be desirable to slacken the pace of the legislative machine. From 1882 to 1912 there was very little codification (i.e. expression in authoritative writings of law previously to be gathered from traditions and records of a much more flexible and less authoritative character). But at the same time we have got all the codes dealing with procedure revised and consolidated—the Civil and Criminal Procedure Codes, the Limitation Act and the Registration Act have been amended and consolidated. The important codifying Acts passed during this period are the Bengal Tenancy Act, (VIII of 1885) The Factories Act, (XII of 1911) The Army Act, (VIII of 1911). The Lunacy Act, (IV of 1912), The Life Assurance Companies Act, (VI of 1912) and the Indian Companies Act, (VII of 1913)

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Slackening the
pace of the
legislative
machine

Then again when we examine the history and working of the different codifying Acts against which the cry of over-legislation was raised we find that they have generally worked smoothly and satisfactorily. In spite of the defects of the Indian Contract Act, the Indian Evidence Act, the Probate and Administration Act, the Transfer of Property Act all these Acts have proved themselves of great use both to the Judges and the people of the country. The cry of over-legislation was raised whenever the Legislative Department became active and will be raised again whenever it will try to codify the laws of the country; but at the present time there is no ground for raising such a cry. On the other hand the mercantile communities have been asking for codification of Company Law, Partnership Law (especially of joint-family business) and Insurance law. There has been partial response and a revised Companies Act has already been passed and will come into force on the 1st day of April 1914.

Now let us examine the second objection to further codification, viz. the Judges' and other officials' objection that the whole of their time is absorbed in criticising new Bills and learning new Acts. The right to criti-

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(b) Judges' and other officials' objection.

aise new Bills belongs only to a limited number of Judges and other officials and they can easily spare time for this purpose. But the important point in connection with this objection is that the Judges have to learn new Acts. Codification or no codification the Judges will have to read the cases reported in the Law Reports and learn what they can from them. They will have to devote some portion of their time to learning the rules of law laid down in the Reported cases. Then again the passing of a new code does not mean the overruling of all the old rules and introduction of new rules of law ; but only means that the rules which they had to gather from traditions, customs and records of a much more flexible and less authoritative character, have been expressed in an authoritative form , it is only in a few cases that they have to learn new Acts

(c) Legislative experiments of questionable utility and of unquestionable costs.

About the third objection viz that India being made the subject of legislative experiments of questionable utility and of unquestionable costs, let us see what the utility is of the codes against which this objection was raised viz. the Probate and Administration Act, Transfer of Property Act, the Negotiable Instruments Act, the Easements Act and the Procedure codes of 1882. None of these Acts is of questionable utility ; each one of them by making the law cognoscible to the public has saved the country from a good deal of unnecessary litigation. The Probate and Administration Act has been extended to different parts of British India in which it was not applicable at the time when it was passed (1). The Negotiable Instruments Act of 1881 has been amended by 3 subsequent enactments only and has been made applicable to cases in Upper Burma (except the Shan States) (2). The Transfer of Property Act has also been amended, but the amending Acts do not show that that Act is of questionable utility. On the other hand its operation has been extended to the whole of the territories, other than the scheduled Districts, under the administration of the Government of Bombay (3), and the area included within the limits of Rangoon Town (4) as from time to time defined for the purposes of the Lower Burma Courts, Act, 1900, and within the Municipalities of Moulmein,

(1) To Santhal Parganas by Reg III of 1872 as amended by Reg. III of 1899, §3.

To British Beluchistan by Reg I of 1891 §3.

To Upper Burma by Reg. I of 1890 §3

(2) By Act XIII of 1898 §4.

(3) *Bombay Government Gazette*, 1892 Pt. I. p. 1071.

(4) *Burma Gazette*, 1901. Pt. I pp 628, 684.

Bassein and Akayab.—The Easements Act of 1882 has only one section amended (1) and that is only a verbal amendment ; and its operation has been extended to Bombay and the United Provinces by Act VIII of 1891.—The Indian Trusts Act has been partially affected by two subsequent Acts and its operation has been extended to Bombay Presidency, including the Scheduled Districts (2), and Rangoon Town (3) If these Acts passed in 1881 and 1882 were of questionable utility then their operation would not have been extended to Provinces where they were not in force before Then about costs. Yes, codification does mean costs but delay in codification will not save costs. True, the Imperial Exchequer may be saved some costs by not codifying the laws. Under the new conditions that have come in, the costs of the Legislative Departments and Legislative machinery are more or less permanent, and progressive codification will not materially add to the extra or occasional costs On the other hand by deferring codification and trusting to judicial legislation, the individual litigants will have to pay the costs for they will have to assist in evolving judge-made or judiciary laws While codification means costs to be paid by the Government of the country—judiciary or judge-made laws, as pointed out by Sir Henry Maine, mean costs to be borne by individual litigants.

So we find that the causes which led to the cessation of codification have very little weight and should not be allowed to put a stop to codification in this country For the purpose of determining in what direction the work of codification could be most usefully carried on, Sir C. P. Ilbert suggests four empirical tests (4) :—

Ilbert's empirical tests.

1. What classes of cases, judging from the Indian Law Reports, afford the greatest material for litigation ?
2. Does the litigation in these classes of cases arise in the Presidency towns, where judges are aided by the arguments of counsel and a well-stocked library, or in the country, where judges have to decide as best they may without those aids ?
3. How far does the litigation arise from uncertainty of the law, and how far from difficulties inherent in the subject-matter ?

(1) In §14 the words "a right" were substituted for the word "right" by the *Repealing and Amending Act* (XII of 1891).

(2) *Bombay Gazette* 1891. Pt. I. p. 713.

(3) *Burma Gazette* 1904. Pt. I. p. 628.

(4) *Legislative Methods and Forms* p. 149.

L.R.C. IX

4. How far is it possible to declare the law without raising difficult and delicate questions ?

Their application
to the law of
(a) Torts

Sir C. P. Ilbert, by applying these tests, finds that the law of Torts or at least some portions of it should be codified. In the last edition of the Digest of Indian cases, published in 1912, under the authority of the Government of India, there are nearly three hundred cases under six important heads of this subject (1). With a Draft Bill on this subject, by such an eminent jurist as Sir Frederick Pollock, with the remarks of Sir Henry Maine, Sir James Stephen and Sir C. P. Ilbert, recommending codification of Law of Torts, it is really inexplicable how this branch of law still remains uncodified. But as to the utility and desirability of codification of this branch of law there is no question.

(b) Master and
servant

Then let us take the Law of Master and Servant. The Draft Bill prepared by Dr Whitley Stokes was prepared, says Sir C. P. Ilbert (2), because of the demand of a class of European employers who were anxious to obtain a more summary power of punishing their servants for breach of duty. But now a days the demand comes not only from Europeans but also from the inhabitants (of all classes,) of all the principal towns in India. In Bengal, contemporary literature contains references to the "miserable condition" of the "masters" and "flourishing" condition of the servants and servants now-a-days are really the masters and masters, the servants. There can be no doubt that the question has attained an acute stage, as evidenced by the several newspaper reports as well as by questions put in the Legislative Council of Bengal by the Hon'ble Dr D. P. Sarvadhikary. Bombay, Calcutta, Madras and Rangoon will welcome such a measure.

True, cases involving the question of relation between masters and servants, for obvious reasons of convenience, very seldom come before the courts, but that does not show that the law on the subject does not require codification, but simply shows that in the absence of a code on the sub-

(1) Defamation	.	.	64 cases
Libel	..	..	20 "
Malicious Prosecution	.	...	50 "
Malicious search	...	..	1 "
Damages for Torts	...	...	99 "
Measure and assessment of damages	..	..	51 "
			285

(2) *Legislative Methods and Forms* p. 148.

ject the people of the country do not know what their rights are and how they are to enforce them. LECT. IX

Then again the law relating to Hindu joint-family business is also in a state of great confusion. The question of framing a suit against such a partnership business, the question of joinder of parties and the question of liability of parties whose ancestors were partners in such business and who now share the profit and loss of the business are some of the questions which require an answer and should be answered as soon as possible

This subject brings in the important and thorny question of codification of the personal laws of the Hindus and Mahomedans, which I shall deal with in Lectures XI and XII and I shall only mention here that the Legislative machinery which has produced the present Anglo-Indian Codes is quite unequal to the task of producing codes containing the laws relating to the personal laws of the Hindus and Mahomedans and I shall show in this lecture what the conditions precedent are to further codification in this country.

These conditions are (I) that the quantity and quality of the *materials* for codification should be improved (II) that the codifiers i.e. those who will use these materials, should be "scientific lawyers." In this connection we shall also consider the question how can we have such a body of experts or "competent scientific lawyers "

Conditions precedent to codification.

(I) We have in a previous lecture noticed what the materials are for codification. They are (a) Digests, (b) Law Reports, (c) Foreign Codes and Rules of English law stripped of technicalities and local peculiarities, (d) Hindu and Mahomedan law, (e) Customary laws. Let us take Digests first. We have noticed how useful Digests are in the work of codification and that in this country it is not only Digests by private authors, but also Digests prepared under the authority of the Government, should be in existence before any further move can be made in this direction. In this connection we have the *Punjab Civil Code* drafted by Sir Richard Temple as an example of official Digest. That book, though not a Code, but an official Digest was as helpful to the administrators of justice as a regular Code and was subsequently used as the basis of the *Punjab Laws Act*. At the present time the Tagore Lectures of the late Prof. Raj Coomar Sarvadhikary, Sir Gooroodas Banerjee, Shastri Golap Chandra Sarkar and of others may be the basis of Digests of law relating to Hindu

I Improved materials for codification.

LEC. IX

(a) Digests

Law of Succession, Marriage and Stridhan, and Adoption There are also the Lectures on Hindu Widows, Alluvion and Diluvion, and Hindu Joint Family. Digests, based on these Lectures, altered in the light of cases decided subsequent to the publication of those lectures and published under the authority of the Government will prove to be a great help to future codification because, the rules laid down in those Digests will have to stand the test of time and the scrutiny of different learned judges and after a few years it will be found that there will be unanimity of opinion on certain of the rules of the Digests and those may be inserted in a subsequent code. It will also be found that there will be some difference of opinion on other rules and the legislature will afterwards settle the matter in the light of those decisions. In fact the procedure adopted in the case of the *Punjab Laws Act* will be repeated. These are the reasons why the Tagore lectures mentioned above should be digested as also the law relating to Master and Servant. The Draft Civil Wrongs Bill for India by Sir Frederick Pollock may also be given a fair trial as a Digest. These Digests of course will not be referred to as authorities but they will be regarded as guides, as was the case with the *Punjab Civil Code*, and judges will have the power to discuss and criticize the provisions of these Digests. If necessary, different editions at the interval of 10 or 12 years, embodying the changes suggested by judicial decisions, should be published by the Government till there is a fair amount of unanimity of judicial opinion on the rules of law laid down in the Digests and then Codes based on these Digests may be framed and passed. In this connection we should notice the plan adopted in Lord Halsbury's *The Laws of England*. This plan is that different treatises upon various divisions of the law by different authors should be brought together, so that a selected body of writers may expound their several topics, and at the same time refer to such authoritative decisions and enactments as support the propositions which they lay down (1). The result of adoption of such a plan is not a mere encyclopædia—not a mere collection of cases, but a number of treatises composed by learned lawyers, supported by the decision of great judges. In British India, digests based on Sir Gooroodas Banerjee's Tagore Lectures on "*Marriage and Stridhan*", Shastri's Tagore Lectures on "*Adoption*", the late Rajcoomar Sarvadh-

Lord Halsbury's
Laws of England.

(1) Halsbury's *The Laws of England* Vol I. Intro. p. CCXVI.

kary's Tagore Lectures on "*the Hindu Law of Inheritance*", Bhattacharyya's Tagore Lectures on the "*Law relating to the joint Hindu Family*" and Doss's Tagore Lectures on "*Alluvion and Diluvion*" will be of great use to the legislators for codification of those branches of law.

One aspect of Law Reports is to show how the decisions bear upon the general body of law. This may be called the *legislative aspect* of the case. Every judicial decision is an authoritative declaration of the legal result of the facts before the Court. If the facts are such as to call for some new application of principle, if former applications of principles are disturbed by the decision, or if having been seriously questioned they are reaffirmed, in such cases some addition has been made to the body of the law, which may be of little or may be of great importance. Thus the law is in a continual state of growth and flux by the accretion of judicial decisions. Such a decision may affect one way or another a great number of transactions of mankind. And so far as this effect of a decision goes, the judge does something more than settle the dispute between the parties; he lays down law for the whole country and decides in anticipation cases for other and future litigants. Now, for the settlement of the particular dispute there is no need of report, the judge's opinion is equally conclusive whether it is reported well or ill, or not at all. But as regards its effect on the law, every thing depends on the report. "Unreported decisions" says Lord Hobhouse (1) "are like the heroes who lived before Agamemnon, of whom we are told that they lived indeed, but are unwept, unknown, sunk in eternal darkness for lack of a sacred bard."

(b) Law Reports.

If a decision is badly reported it may hold out false lights for many years, and so cause mischief to innocent wayfarers. In short, the judge in his capacity of lawgiver speaks to the world through his Reporter, and he affects the law nearly in proportion as his cases are well or ill selected for report, and as the reports of them are well or ill executed.

It has been alleged of the reporter Vernon, that he

(1) *Abstracts of Proceedings* (1871), Vol. XIII, 55. The late Mr. W. C. Bonnerjee, who was one of the leaders of the Calcutta Bar had such good memory that he remembered the number and title of almost every case in which he appeared, whether reported or not and used to refer to such cases, though unreported, and to have the necessary records of the Court produced in support of his contention, to the confusion of his opponents. Mr. A. Phillips, a contemporary of Mr. Bonnerjee used to say that he was always afraid Mr. Bonnerjee's unreported cases.

had a spite against a Chancellor whose decisions he reported, and so adjusted his reports as to exhibit the judgments in a bad light. "I remember" says Lord Hobhouse (1) "on one occasion a case being cited from Vernon's reports, when Lord Justice Turner, admitting that it had been received as law for a century and a half, thought it so wrong that there must be some mistake. He stopped the argument, sent for the record, and found that the facts were misreported and the case was not any authority, for the proposition indicated by the Reporter. So people found that, instead of a true divinity, they had been worshipping a stock or a stone, and that, under the guise of a divine afflatus from the oracle, they had only been listening to the uninspired utterance of its priest."

Now if all these things are borne in mind—the power of the Reporter, the binding authority of the reported decision over subordinate courts, its influence with Co-ordinate Courts, if we also remember that a large portion of the law of the country will be found not in Statutes, but in judicial decisions, we shall feel the great importance of having our reporting done well. Reporting, according to Sir James Stephen, should be regarded as a branch of legislation. After the passing of the Indian Law Reports Act of 1875 the Government took the business of reporting in the High Courts under their own supervision and this was done with a view of diminishing the quantity and improving the quality of the reports published for forensic use in British India.

Section 3 of the Indian Law Reports Act (XVIII of 1875) was framed to constitute a monopoly, if the Judges so desired, for the authorized Law Reports. It does not prevent the Court from looking at an unreported judgment of other judges of the same court. A judgment is none the less an authority because it has not been reported, otherwise the question whether a judgment can or cannot be regarded, will depend upon the mere whim of the Reporter (2)

(c) Foreign Codes. We have already examined the value of Foreign Codes as materials for codification in this country. In France, Germany and Japan, the Ministry of Justice or the Bureau for the "investigation of institutions" have got the codes of foreign countries translated into the vernaculars of those countries.

(1) *Abstracts of Proceedings*. (1874) Vol. XIII. 56.

(2) *Mahomed Ali v. Mir Nazari Ali* (1901) 5 C. W. N. 326, 329.

In British India, some of the important provisions of some of the British Indian Codes have been either borrowed from or based upon the provisions of foreign codes and it is of the utmost importance as an aid to proper understanding and amplification of principles of codification that the French, German and Japanese Codes should be translated into English or if possible into the vernacular languages of this country (1).

Hindu and Mahomedan Law —This branch includes the personal laws of the Hindus and Mahomedans and I shall deal with this subject in last two lectures

(d) Hindu and Mahomedan Law.

Customary Law.—This branch of law is of great importance in this country I shall deal with codification of customary laws in the next lecture and shall simply mention here that the only feasible means of getting this branch of law codified will be by having Digests of customs prevailing in this country

(e) Customary laws

(II) Now I shall deal with the second point viz that the codifiers should be “scientific lawyers” or in other words the work of codification should be entrusted to a body of experts and this work cannot be satisfactorily done by a legislature modelled after the British Parliament Codification to be really beneficial to the people must be done by a number of competent “scientific lawyers”

II Codifiers should be “Scientific lawyers”.

“No one” says Napoleon (2) “can have greater respect for the independence of the legislative power than I: but legislation does not mean finance, criticism of the administration, or ninety-nine out of the hundred things with which in England Parliament occupies itself. The legislature should *legislate*, i.e. construct grand laws on scientific principles of jurisprudence .. and, as its legislative labours are essentially of a scientific kind, there can be no reason why its debates should be reported”. But grand laws on scientific principles of jurisprudence cannot be constructed unless the members of the legislature are scientific lawyers If the drafting of laws is left to experts, a good deal of dissatisfaction on the part of the public will cease.

Napoleon on British Parliament.

None but lawyers, intimately acquainted with the system of law to be codified can ever produce it with effect. But a mere acquaintance with the actual detail of the system however extensive and accurate will not suffice. It is necessary that those, who are called to the “heroical work” of

(1) See *infra* Legal education.

(2) Sir J. Seeley's *Introduction to Political Science*. p. 216.
Sir C. P. Ilbert's *Legislative Methods and Forms*. Ch. X. p. 208.

LÆC. IX

Austin.

Study of
Jurisprudence.

codification, should possess mastery of the system, considered as an organic whole. It is necessary that the codifiers should possess clear and precise and ever-present conceptions of the fundamental principles and distinctions and of the import of the leading expressions; that they should have constantly before their mind a map of the law as a whole, enabling them to subordinate the less general under the more general, to analyse and translate the general into the particular that it contains; to perceive the relations of the parts to one another, and thus to travel from general to particular and particular to general and from a part of its relations to other parts, with readiness and ease. The only men to originate and accomplish legislative innovations, are enlightened practical lawyers, combining all that philosophy can yield, with all the indispensable supplements of philosophy which nothing but practice can impart, combining an intimate knowledge of the existing system of law, with power and readiness to appreciate its merits and defects. The study of General Jurisprudence has a tendency to form men qualified with the very talent which is most necessary for systematization (or simplification) which is the great condition, *sine qua non* of codification. It tends to fix in the mind a map of the law; so that all its acquisitions made empirically in the course of practice, take their appropriate places in a well-conceived system, instead of forming a chaotic aggregate of several unconnected and merely arbitrary rules. True, a sufficiently accurate knowledge of detail can only be acquired by practice founded on previous study; but there is a great difference between the practical tact which suffices for the mere application of rules to practice, or for discovery of rules applicable to a given case, and the adequate and clear perception of the legal system as a whole, and of the relations of its parts. An adequate and clear perception of the legal system as a whole is necessary to the legislator, who is concerned, not with the mere application of rules, but with reconstruction of such rules, their expression and arrangement and with the numerous consequences with which any proposed innovation may be pregnant. "Mere theorists" says Austin (1) "are apt to stick at barren generalities, or to take no correct measure of what is practicable under existing circumstances. Mere practitioners (however able they may be) are not capable of subordinating

(1) *Jurisprudence* Vol. III. 381.

details to generalities and of perceiving the extent of such generalities, and moreover are incapable (from want of any standard of comparison) of appreciating the defects of their own system." But at the same time it is erroneous to suppose that Theory and Practice are incompatible, though there are doubtless men to whom theory is more particularly useful ; while there are others who would do well to avoid it. In order that even lawyers may be fitted for guiding legislation, it is necessary that they should be lawyers who not only possess the indispensable requisite of familiar acquaintance with the actual system, and with the actual position of the country, but should also be acquainted with the science of legislation, general and comparative jurisprudence and all those sciences (e.g. Political Economy &c) from which the science of legislation, considered as the science of law as it should be, is in great measure derived. Without these studies they cannot and will not appreciate impartially and justly, the merits and demerits of the existing law, the wants of the country, the expediency or in expediency of proposed innovations. Every process of codification is worked out on a pre-conceived and previously stated plan of the whole system to be worked upon. Unless those, who execute the plan in detail have something of a guide in the plan itself and have mastered the law to be worked upon as an organic whole, they will be working on a part inextricably connected with the rest of the whole, without any perception of its relation to that unexplored or at least undetermined residue. The talent and knowledge requisite for such a task cannot be acquired by a merely empirical study of any particular system of law, or by the mere habit of applying its rules to particular cases in the course of practice. They can only be acquired by scientific study of law.

"Any Government" says John Stuart Mill (1) "fit for a high state of civilization would have as one of its fundamental elements a small body, nor exceeding J. S. Mill. in number the members of a Cabinet, who should act as a Commission of Legislation, having for its appointed office to make the laws. If the laws of this country were, as surely they will soon be, revised and put into a connected form, the Commission of Codification by which this is effected should remain as a permanent institution, to watch over the work, protect it from deterioration, and make

(1) *Representative Government*, Ch. V. "Of the proper functions of representative bodies."

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further improvements as often as required. No one would wish that this body should have of itself any power of "enacting" laws ; the Commission would only embody the element of intelligence in their construction ; Parliament would represent that of will. No measure would become a law until expressly sanctioned by Parliament, and Parliament, or either House, would have the power not only of rejecting but of sending back a Bill to the Commission for reconsideration or improvement. Either House might also exercise its initiative by referring any subject to the Commission with directions to prepare a law. The Commission, of course, would have no power of refusing its instrumentality to any legislation which the country desired. Instructions, concurred in by both Houses, to draw up a Bill which should effect a particular purpose, would be imperative on the Commissioners, unless they preferred to resign their office. Once framed, however, Parliament should have no power to alter the measure, but solely to pass or reject it ; or, if partially disapproved of, remit it to the Commission for reconsideration. The Commissioners should be appointed by the Crown, but should hold their offices for a time certain, say five years, unless removed on an address from the two Houses of Parliament, grounded either on personal misconduct (as in the case of judges), or on refusal to draw up a Bill in obedience to the demands of Parliament "

Permanent Law
Commission.

A Permanent Law Commission or a Ministry of Justice is essentially necessary for further codification in this country for various reasons : (a) If codification is to be done well, it must be done by experts whose time is valuable. The case is not as though the Indian Legislative Department had nothing to occupy itself with except codification. "Even if it were to leave this work undone it would still remain the hardest worked of all the Indian departments. It could not do more without strengthening its staff or seeking extrinsic aid" (1). The Permanent Law Commission will render this extrinsic aid. (b) Such a Commission or Ministry of Justice will supply the improved machinery to work new materials into the codes during the interval between periodical revisions. (c) Such a Commission is necessary for receiving complaints against the law, because cases of hardship continually occur that never enter courts of Justice, and defects in the law are often suggested to lawyers in private practice, by cases

(1) *Hilbert's Legislative Methods and Forms* pp. 151, 152.

neither in court nor in hand, which they forget in the hurry of business, but which might be made available for law reform if there is a Commission to which they might be notified (1). L.E.C. IX

We have already noticed the requisite qualifications of codifiers and it is plain that if codification on a large scale is to be undertaken in British India, the Indian Universities should encourage the study of comparative jurisprudence and of such study as will produce "scientific lawyers," because the work of codification in future will be done in India and by Indians generally, for the simple reason that most part of the work of codification will be the codification of the personal laws of the Hindus and Mahomedans, which, according to the opinion of the Second Indian Law Commission, ought not to be enacted as such in any form by a British Legislature. This leads us to the third point i.e. how can we have such a body of "scientific lawyers." We have noticed above the requisite qualifications of "scientific lawyers" and we have the example of the Japanese to show how such a body of lawyers can be trained. In the history of Japanese codification we find that the Japanese students absorbed foreign laws at Paris, Leyden, Leipzig, Berlin and the English Inns of Court. Almost simultaneously Occidental law began to be taught in Japan. In a separate law school attached to the department of justice and in two or three private law schools French law was taught, and also "natural law." This latter law "was simply general West European law viewed from a French angle." English law was taught in the Imperial University of Tokio from 1874. In 1887 legal instruction in the University of Tokio was reorganized in four sections: English law, French law, German law, and "political science." Simultaneously, as in the theoretical reception of Roman law in mediæval Europe, there was an attempt to popularize the foreign law by translations and treatises in the native tongue. In 1870 was established a Government bureau for the "investigation of institutions," and one of the first products was a translation of the French Codes.

III How can we have such a body of "scientific lawyers."

Japan.

In Germany also the syllabus of studies for law students is a pretty long one. The following is a list of the obligatory (compulsory) lectures both on Law and Political Science in Germany:—

(1) See Lec. XI for the Machinery for Codification of the Personal Laws of the Hindus and Mahomedans.

A. On Law.

Germany.

1. Legal Encyclopædia or introduction to law.
2. History of Roman Law.
3. German legal history.
4. The system of Roman Law (substantive law).
5. Procedure in Roman Law (Adjective law).
6. Outlines of ancient German (Teutonic) Law.
7. Exposition of the development of legal institution in Prussia.
8. Modern German Private law (German Civil Code). (a) General sketch and survey.
(b) Detailed explanations of the different parts of the code *viz* ,
(i) General Part (Book I)
(ii) Law of Contracts and Torts (Book II)
(iii) Law of Personal and Real Property (Book III)
(iv) Family Law (Book IV)
(v) Law of Inheritance (Book V).
9. Commercial Law.
10. Law of Bills of Exchange, Promissory Notes and Cheques.
11. Maritime Law.
12. Organization and Functions of the courts of Justice.
13. German Civil Procedure.
14. Execution of Judgments.
15. Law of Bankruptcy.
16. Criminal Law.
17. Criminal Procedure
18. Ecclesiastical Law (*Corpus Juris Canonici* and modern Roman Catholic and Evangelical law).
19. German and Prussian Constitutional Law.
20. German and Prussian Administrative Law
21. Public International Law.
22. Private International Law.
23. Philosophy of Law (Jurisprudence)
24. Forensic Medicine.

B. On Political Science.

1. Theoretical or General Political Economy.
2. Practical or Special Political Economy.
3. Finance.

In addition to these lectures law students, in Germany, are obliged to attend a certain number of classes and semi-

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 naries, in which they receive catechetical instructions, and have also to write essays on legal questions from time to time. These exercises are returned, corrected with a written criticism. These papers must be submitted to the examiners before they are allowed to enter upon their first legal examination. The law students are also required to attend lectures on Logic, Psychology, History of Philosophy, General Roman and German history (1).

Such are the systems of legal education in two of the countries where codification has been triumphantly successful. Signs of the times clearly show that the University authorities here realize that without improved system of legal education in this country no perceptible progress in the work of codification can be made. Steady attempts are now being made to impart education that will enable the future generations to undertake the arduous and important task of codification successfully. Indian Universities

It has already been mentioned that the machinery for codification requires thorough overhauling and several important enactments passed during the last fifty years clearly show that the Government of the country is overhauling and readjusting the machinery for codification, is trying to have the help and co-operation of the people in this matter. In a previous lecture it has been stated that up to the year 1834 the Provincial Governors in Council of Bombay and Madras, in the exercise of the legislative power conferred upon them, passed a good many regulations, that in the year 1833, the legislative authority of the Provincial Governors was taken away and there was established only one legislative council for whole of British India; and that in 1861 the legislative authority was given back to the Governors of Bombay and Madras and a Legislative Council was created for the Presidency of Fort William. By the Government of India Act of 1861 the Governor-General of India was authorized to create legislative councils for any province in British India, and the Legislative Councils for the Punjab, the United Provinces and Burma have been established (2). In 1912 Legislative Councils for the Central Provinces, Assam and the new Province of Behar and Orissa were established. These provincial legislative bodies possess, subject to a controlling authority on the part of the

(1) *Law Magazine and Review* (1901). See also 14 *Madras Law Journal* p. 128. XXX *Law Quarterly Review* 46. (1911)

(2) See Lecture V.

L.R.C. IX

General and
Particular
codification.

Governor-General of India in Council ample powers of legislation for purely local purposes and they can also, with the previous sanction of the Governor-General of India in Council, amend and modify any provision of any Act of the Government of India. These provincial legislative councils, composed as they are of men of great local experience, conversant with the people of their Province and with their manners and customs, are best qualified to deal with legislation of a purely local character. Besides developing the *general codification* (i.e. enactment of codes applicable throughout whole of British India) the Legislative Council of the Governor-General of India may do much for *particular codification* (i.e. enactment of codes applicable only to a certain particular locality or to particular sects or communities). But the local legislative councils are better fitted for *particular codification* than the legislative council of the Governor-General. Much useful work has already been accomplished by the Provincial Legislatures as may be seen by any one who glances at the volumes of the different Provincial Codes, published under the authority of the Government of India and entitled the Bengal Code, the Bombay Code, the Madras Code, the Coorg Code, &c. Gradually the number of local legislative councils is increasing and fresh facilities are being afforded for introducing beneficial local legislation in these councils and it is hoped that the cause of "particular codification" will make some progress in this country. Then again, the new plan of grouping together under appropriate heads all the enactments which deal with the same subject matter by whatever legislative authority they were passed, adopted by the Legislative Department of the Government of Bengal, in the third edition of the Bengal Code, is a step in the right direction and is sure to help the cause of consolidation, if not of codification, of law in British India.

Plan of Sir
Thomas Raleigh

We should also notice here that the proper mode of codifying law in this country, as recommended by Sir H. S. Maine, is to draw up a code applicable to a particular province, in the first instance and then after watching its operation for some time, it may be made applicable to the whole of British India. This was done in the case of the Transfer of Property Act and some other Acts of the legislative council of the Governor-General of India. A Bill to regulate the relation of master and servant, applicable at first only to a few selected areas may be passed by the Imperial Legislative Council; then if it is found that it is working

satisfactorily, its operation may be extended to other parts of the country. LEC. IX

Lastly, let us see what the opinion of competent authorities is on this subject of further codification in this country. In the history of codification we find the names of Macaulay, Maine, Stephen and Stokes writ large on every page, the Anglo-Indian codes are the product of their labour—they maintained that substantive civil law, except the personal laws of the Hindus and Mahomedans, should be codified and they had some branches of substantive civil law codified and recommended that other branches should be codified. Amongst the living authorities Sir C. P. Ilbert and Sir Roland Wilson are also for codification in this country. It is the accepted policy of Parliament and of the India Government that a complete code of substantive law is to be given to India. In spite of all these facts the law of Torts, codification of which has been recommended by Sir Henry S. Maine, Sir James Stephen, Dr. Stokes and Sir C. P. Ilbert, and that a Draft of a Civil Wrongs Bill by Sir F. Pollock has been in existence since 1886, is still uncodified. Lord Macaulay's Draft Penal Code was pigeon-holed for nearly a quarter of a century and little wonder that Sir F. Pollock's Draft of Civil Wrongs Bill has also met with a similar fate. It is sometimes stated that this is due to the fact that the feeling of the people of India towards codification is not so friendly. But this is not so. "So far as I am aware" says Sir Sayyid Ahmed (1) "the Native public has never raised its voice against codification. To them, the codified laws mean the introduction of certainty where there is uncertainty, precision where there is vagueness. Nor can it be said that codification is unpopular even among the most conservative sections of my countrymen. I must have lived to declining old age amongst them in vain if I am not, even at this time of life, in a position to say confidently, that of all the innumerable blessings of the British rule, the one my countrymen esteem most is justice; that justice in their eyes means peace and order, which, in other words, mean security to life and property—the sole aim and end of Government. At present, whilst a splendid Penal Code and a Criminal Procedure Code regulate criminal matters, the civil law is administered on the somewhat vague, though noble, principle of "Justice, equity and good conscience" a principle much of whose beauty is practically spoilt by the fact

People of India
and codification.

Sir Sayyid
Ahmed

(1) *Abstract of Proceedings of the Legislative Council of the Governor-General.* 26th January 1882. pp. 63, 64

that individual judges in similar cases do not take the same view of that noble maxim. The result is an uncertainty as to rights which reduces litigation to a form of pecuniary speculation, from which springs that most deplorable class of suits in which the parties, agreeing as to facts, have no authoritative means of ascertaining the law. Codification and codification alone, can remedy the evils which arise from uncertainty of law: codification alone can enable the public to know their exact rights and obligations. Codification alone can enable proprietors and litigants, advocates and judges, to know for certain the law which regulates the dealings of citizens in British India. Codification alone will enable the deliberate will of the Legislature to prevail over the opinions of individual judges; and the litigants will then be more anxious, before going into court, to consult the statute book of the land than the mental proclivities of the individual judges before whom their disputes may have to go for decision. . . . To say that the Native mind is unfamiliar with the idea of living under systematically codified law, is to say what the truths of history do not justify. The Institutes of Manu furnish a noble example of ancient codification. . . . The history of the Mahomedans furnishes a long series of attempts to codify their laws. In the earliest days of the Caliphs of Bagdad, books were compiled under the authority of the Caliphs, to supply the requirements of a code. These books from their very names indicate that they were meant to be codes. The attempt at codification continued down to the time of the Mughal Emperor, Aurangzeb, and in the *Fatawa-i-Alamgiri* we find perhaps, the most magnificent and most durable monument of that remarkable monarch's reign. The conditions of life in India have since undergone a great change and whilst the personal laws of Hindus and Mahomedans are secured to them, the British rule has asserted its right to regulate purely temporal matters so as to suit the more advanced requirements of the present age. The people of India have gladly and loyally accepted this fact and there can be no justification for saying that the mind of the Native public is unprepared for saying that the mind of the Native public is unprepared for codification or that attempts on the part of the Government to supply them with a systematic code will be regarded with feelings other than those of satisfaction." From this passage it appears that Sir Sayyed Ahmed supports codification of laws in this country, with this important reservation that the personal laws of the Hindus and Mahomedans should not be touched by the British Indian legisla-

tures We shall deal with the question of codification of L.B.C. IX the personal laws of the Hindus and Mahomedans in the last two lectures, but, as we have noticed before, besides those laws there are other branches of law still uncodified Conclusion. in this country e.g. law of torts, alluvion and diluvion, master and servant and those important branches of customary laws relating to any usage or custom of trade (1), usage relating to *Hundis* etc. (2), those relating to easements (3) and land tenure (4), relation of the members of an undivided family (5), lease (6). Now the question is whether the customary laws may be codified and we shall examine this question in our next lecture

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- (1) *Indian Contract Act* (IX of 1872) § 1.
 - (2) *Negotiable Instruments Act*. (XXVI of 1881) § 1.
 - (3) *Easements Act* (V of 1882) §§ 2, 18, 20
 - (4) *Bengal Tenancy Act* § 183. (VIII of 1885).
 - (5) *The Indian Trusts Act* (II of 1882) § 1.
 - (6) *Transfer of Property Act*, § 108.

LECTURE X.

CODIFICATION OF CUSTOMARY LAW.

Custom as a source of law.

Both according to Hindu (1) and Mahomedan (2) jurisprudence custom is a source of law. But on the question whether clear proof of usage will outweigh the written text of the law there is a difference of opinion not only between Hindu and Mahomedan law, (3) but also amongst the different schools of Hindu Law (4) So far as Hindu Law

(1) Manu I. 108, 110, VIII. 41, 46 Burnell and Hopkins' *Ordinances of Manu*. II 12 p. 17. Sir Gooroodas Banerjee's "*Hindu Law of Marriage and Stridhan*." 3rd Ed. pp. 10-13, 233-235, Shastri's *Hindu Law of Adoption*. pp. 73, 128. Sarvadhikary's *Hindu Law of Inheritance* Lec. VII. p. 336 Jolly's *Outlines of Hindu Law*. pp. 33, 34; Mayne's *Hindu Law*. 7th Ed. p. 47. For recognition of local and caste usages see Manu VII. 203. *Vishnu* III. 42. *Yajnavalkya* I. 342.

(2) Mr Justice Rahim's *Mahomedan Jurisprudence* pp. 55; 136, Wilson's *Digest of Anglo-Muhammadian Law* 3rd Ed. pp. 86, 378. Cf. *Notes on Customary Law of the Punjab* by Boulnois and Rattigan. 2nd Ed p. 14

(3) *Collector of Madua v. Muttu Ramlinga* (1868) 12 M. I. A. 436; 10 W. R. (P.C.) 21. *Ismail v. Imtiaz-un-Nissa* (1907) 3 A. L. J. 792, *Janmya v. Diwan* (1900) 23 A. 20.

(4) *Kumarila Swamin* and other commentators of the *Mimansa* school of philosophy maintain that those customs only shall be given the force of law which are not opposed to the *Sruti* (Veda) and *Smriti*. "It is nowhere asserted" say Prof Jolly "that in the case of a conflict between *Custom* and the *Smriti*, the *Smriti* may be overruled. On the contrary, those customs only shall be given the force of law which are not opposed to the *Sruti* (Veda) and *Smriti*, and the practice of eminently virtuous men (*Sishitas*) even has authority in those cases only which are not expressly provided for in the Veda or *Smriti*." (*Outlines of Hindu Law* p. 35 citing *Gautama* XI 20, *Vasistha* I 5, 17; *Apastamba* II. 6, 15, 1). See also Babu Kisorilal Sarkar's *Tagore Lectures on the Mimansa Rules of Interpretation*. Lec X p. 463, Lec IV. pp. 246, 258. But the Privy Council on the authority of certain text of *Manu* held "under the Hindu system of law clear proof of usage will outweigh the written text of the law" (10 W. R. 21) Referring to this decision Dr. J. N. Bhattacharyya says "the importance given to custom by their Lordships has nothing to justify it beyond Sir W. Jones's erroneous translation of the texts in which the word "*Achara*" occurs in Manu's Code" (Manu I 108-110, 118; II 6, 12, IV. 155-158, 178, VIII. 3, 41) See Dr Bhattacharyya's "*Commentaries on the Hindu Law*" 2nd Ed p. 50. But Sir Gooroodas Banerjee, Prof. Shastri and the late Rai Rajcoomar Sarvadhikary Bahadur have adopted the view taken by the Privy Council. Prof. Shastri explains the origin of the difference of opinion on this point thus "There is a difference of opinion among commentators on the *Mimansa* with respect to the evidentiary force of customs and usages; some commentators are of opinion that usages give rise to an inference of being based on unrecorded or forgotten *Sruti* or Revelation, in the same way as *Smritis* do. While others maintain that as the learned of modern times cannot be taken to have been so familiar with the *Vedas* as Manu and other sages were, the usages observed by the learned of comparatively recent times cannot give rise to an inference of being founded on *Sruti*, but can give

is concerned the fullest effect is given to custom both by LEC. X British Indian Courts and Legislatures. In *Collector of Madura v. Muttu Ramlinga Sathupathy* the Judicial Committee observed (1). "The duty, therefore, of an European Judge, who is under the obligation to administer Hindoo Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindoo system of law, clear proof of usage will outweigh the written text of the law." The following enactments also give the fullest effect to Hindu, Mahomedan and Buddhist customs e.g. *Burma Laws Act* (XIII of 1828) §13; the *Central Provinces Laws Act* (XX of 1875) §5; The *Punjab Laws Act* (IV of 1872) §5; The *North-West Frontier Province Law and Justice Regulation* (Reg. VII of 1901); *Madras Civil Courts Act* (III of 1873) §16. *Bombay Reg. IV of 1827. The Bengal Civil Courts Act* (XII of 1887. In force in Bengal, Assam and the United Provinces) does not give the fullest effect to custom and the result of this omission is that while in the cases of Hindus custom outweighs written texts of law, in the cases of Mahomedans custom cannot override the texts of Mahomedan Law. In Mahomedan Law customs in conflict with the rules of Mahomedan Law can have no legal force. But this rule of Mahomedan law has been done away with throughout British India except in Bengal, Assam, and the United Provinces. In striking contrast to the language used in section 37 of the *Bengal Civil Courts Act* (XII of 1887) is that used in section 5 of the *Punjab Laws Act* (2), the corresponding section which has force in the

Enactments which save customs and usages.

rise only to an inference of being based on some lost or forgotten *Smriti* with which they may be presumed to have been familiar. Accordingly they hold that usages are inferior to *Smritis*, and must not be followed when in conflict with them. But agreeably to the former view *Usages* and *Smritis* are of equal authority as evidence of law, and in case of conflict between them, the former must be taken to be of greater force as being actually observed in practice... . . commentators of the *Mimamsa* school of philosophy, who were opponents of the Buddhists and supporters of Brahmanism, and took upon themselves the task of refuting the peculiar doctrine of Buddhism, felt themselves bound to maintain the superiority of the *Shastras* over human institutions and were therefore unwilling to accept the authority of customs and usages that are contrary to *Shastras*." *Shastri's Hindu Law*. 3rd Ed. pp. 20, 21, 25. See also Sir G. D. Banerjee's *Hindu Law of Marriage and Stridhan*. 3rd Ed. pp. 8, 9.

(1) 12 M. I. A. 436; 10 W. R. (P. C.) 21.

(2) Act IV of 1872 §5. See also the corresponding sections of *Burma Laws Act* and other Acts mentioned above.

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Punjab. That section provides that in questions regarding succession &c. in cases where the parties are Mahomedans, the Mahomedan law is to be followed, except in so far as such law has been altered or abolished by legislative enactments or has been modified by any custom applicable to the parties concerned, and not contrary to justice, equity or good conscience. Section 37 of Act XII of 1887 (*Bengal Civil Courts Act*) which is in force in the United Provinces, Bengal and Assam, gives no opening, where the parties are Mahomedans, to the consideration of customs (1) In Bombay, in *Rahimatbae v. Haji Jussop* (2) it was held that if a custom, as to succession, was found to prevail amongst a sect of Mahomedans and to be valid in other respects, the court would give effect to it, although it differed from the rule of succession laid down in the Koran. Such being the importance of custom and usage in Hindu (3) and Mahomedan Law and the plan of the early Anglo-Indian administrators being not to do away with the rules of Hindu and Mahomedan Law, written or customary, it became necessary to ascertain the usages and customs of the people of the country

Early steps taken to ascertain the customs of Hindus and Mahomedans.

In Bengal, the *Instructions* issued to the supervisors in 1769 specially charged the officers of the Company to ascertain the customs of the people of this province (4) ; but unfortunately the result of the enquiries made by the Supervisors has never been made public, and attempts are now being made by the Rev Mr. Firminger to have the contents of some of these reports published

Bengal.

Systematic attempts had been made by the Government of Bombay to ascertain the customs and usages of the people of that Presidency and now we have got the valuable treatises on the subject by Steele and Borradaile We have also got Sir Mangaldas Nathubhai's *Gujarath Caste Rules*.

Bombay.

In Madras Presidency we have Thurston's *Caste and Tribes of Southern India*, Marshall's *Travels amongst the Todas*, Ram Chandra Ayyar's *Malabar Laws and Customs* as also Census and Administration Reports.

Madras

(1) *Ismail v. Imtiaz-un-Nissa* (1907) 3 A. I. J. 792, *Jamnya v. Diwan* (1900) 23A 20

(2) (1847) *Perry's Oriental Cases* 115.

(3) See Sir Gooroodas Banerjee's *Hindu Law of Marriage and Stridhan* 3rd Ed pp. 8-13. Mayne on *Hindu Law* Ch. III.

(4) "You are to collect the form of the ancient constitution of the province, compared with the present, an account of its possessors or rulers, the order of their succession the particular customs and privileges which they, or their people, have established and enjoyed." See Colebrooke's *Supplement* p 174.

Soon after the annexation of the Punjab attempts were made to ascertain and digest the customs and customary laws of that Province. Now we have got very useful digests of these customs in Tupper's *Punjab Customary Law* and in the "*Notes on customary Law as administered in the courts of the Punjab*" by Boulnois and Rattigan.

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Punjab.

In the United Provinces *Wajib-ul-uzr, Riway-i-am*, the settlement records and Administration papers are the only means of ascertaining customs. Though the statements contained there are of considerable value in determining custom, they cannot be accepted as proof absolute and conclusive. Valuable information on this subject may also be obtained from Sherring's *Hindu Tribes and Castes*. Thus we find that the usages and customs of the people of British India have not yet been ascertained and digested. The next question for our consideration is how far it is practicable to codify customary law.

United Provinces.

On this question there had been and still is a good deal of difference of opinion amongst the authorities. Here I shall first mention the objections to such codification in ancient time.

Practicability of
codification of
customary law.

In the eleventh century India was subdivided into several powerful and independent States. The kingdoms of Mithila in Northern India, and those of Dhara, Kalyana, Kanchi and Kankana in the Southern India were independent kingdoms and there was great reluctance amongst these chiefs to accept the laws imposed by foreign States. The customs and usages of each state had an independent existence of their own, and were for a long time recognised as of superior force to the mediæval laws. Why should not those customs and usages, it was asked, be embodied into a Code, and acknowledged by sovereign authority? "The conservative spirit of Hinduism" says Prof. Sarvadhikary (1) "would not brook the idea of levelling down all the ancient authorities and building on an entirely new fabric. The fiction of *deducing* the customary law from the written law was resorted to, and the result was that the legislators of each State put such an interpretation upon the ancient ordinances as would be conformable to the public opinion of the provinces in which they promulgated their laws. They dared not enact laws which would be repulsive to established usages and they ventured not, to frame rules which could not be sanctioned by the mediæval legislators."

Customary law in
ancient India why
not codified.

(1) *Hindu Law of Inheritance, Tagore Lectures for 1880*.
Lec. VII p. 337.

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Objections to such
codification and
answers thereto

Now, I shall deal with the objections which are sometimes raised against such codification and then I shall deal with the conditions precedent to be satisfied before the undertaking of such a task. Customary laws are not in a state to be codified and they should be ascertained and digested before they can be codified

1st objection
Precipitately
crystallizing
custom.

The most important objection to codification of customary law is that if it is done, there is the danger of precipitately crystallizing customs before they have had time to mature and settle themselves. But this objection is applicable only to the case of half-developed customs of a very youthful society in which the social and moral condition of the people has not had ample time to develop and pass out of the crucible of fluctuation and change insuperable from the early stages of primitive societies. But most of the communities in British India cannot be brought under this category. Some of them were highly civilized even before the advent of the English to this country and some of them were not so when they came under the British rule. But some of these undeveloped communities have had hundred and fifty years and some about hundred years and some (in Burma) about fifty, under a peaceful government, to develop and expand. Their customs have been frequently investigated, both in the course of settlement operations and for the purposes of judicial enquiry, and a certain amount of materials exists from which the leading canons relating to succession and transfer of property and tenancy &c. can be extracted. The danger of precipitately crystallizing customs is really non-existent.

2nd objection.
Such a Code will
check the progress
of society.

The second objection is that such a code will check the progress of the different communities. This objection is allied to the first and has been discussed in a previous lecture. Such a code, say the supporters of such codification, instead of checking the progress of the community will ensure the prosperity of the different classes by preserving for them the constitution of their community and their possession of land. This object, according to the supporters of such codification, will be attained by substituting codes for judge-made laws, the advantages and disadvantages of which I have already mentioned.

3rd objection.
It will involve
novel and
distasteful
legislation.

The third objection is that the framing of such a code will involve novel and distasteful legislation. When we remember that the codifier will have to depend mainly on the law as ascertained and approved of by judicial decision and that he will have to extract leading canons relating to

different branches of law from a body of customs already ascertained he will scarcely have any occasion for enacting novel and distasteful laws. Instead of doing so, he will maintain all that is healthy and good in a system which is suited to the people and cherished by them. L.R.C. X*

But some authorities (1) have doubted whether the love of the Indians for their local usages had "not been slightly exaggerated, and whether it was altogether expedient to legislate so as practically to petrify all those usages, and thus to prevent the natural modification which they would otherwise have received." In 1878 Colonel McMahon (the Commissioner of Hissar) proposed to omit from the *Alluvion Bill* the clause saving usages. He thought that the Legislature had gone quite far enough in their laudable desire to give free scope to local customs, and that there was some fear "lest we should go too much in the other extreme and stereotype customs which are unjust in themselves and which the people, were they consulted, would wish to modify or abrogate". The instances of such unjust customs were :— Dr. Stokes.

- (a) The local custom of *Kishtibanna* (2) on the Beas, according to which, when the river suddenly changes its course, the proprietary and cultivating rights to all the land transferred from one bank of the deep stream to the other are, by this accident, transferred from the former proprietors and cultivators to new proprietors and cultivators on the other side of the river, even though the change in the course does not carry away the surface of the ground or destroy its identity. Referring to this custom Dr. Stokes remarked that nothing could be more unjust or irrational, or injurious both to the riparian owners and the land-revenue. Nevertheless in the *Hoshiarpur Case* (Punjab Rec. No. 56 of 1869) the Chief Court of the Punjab upheld this usage though saying "we regret that the custom of *Kishtibanna* has not been lawfully abrogated, as we are fully sensible of its evil effects."

(1) *Abstract of Proceedings of the Council of the Governor-General of India*. 1878. Vol. XVII. pp. 246, 247 Per Dr. Whitley Stokes introducing the *Alluvion Bill* on the 2nd Oct., 1878.

(2) Rattigan's *Notes on Customary Law of the Punjab*. 2nd Ed. p. 256.

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(b) Dr. Stokes further stated that the natives of the Madras Presidency would have discarded some of their most peculiar usages had they not been foiled in their attempts to do so by the conservatism of the Court of Sadar Adalat e.g. in Malabar, where property was held by those indissoluble family unions called *lanawads*, where land acquired by the individual exertions of any member, which he did not dispose of in his life time, belonged to the union, there had been constant, but unsuccessful efforts to change the local usage for the less strictly corporate system of the Mitakshara.

(c) Dr. Stokes also pointed out that the natives of Madras, who were governed by Mitakshara, were constantly striving, but, owing to the higher Courts, striving in vain, to deal with their property as if they were under the Bengal law. Speaking of codification of custom Dr. Stokes said (1) that Sir John Lubbock (Lord Avebury), Mr Tylor and other students of primitive culture would perhaps be gratified by the artificial preservation of interesting specimens of archaic usage, but that he hardly thought that that was the function either of the legislatures or the Courts of British India.

When such a staunch supporter of codification in British India as Dr. Whitley Stokes speaks thus on this subject it can safely be stated that the time for codification of the Customary Law in this country has not yet come. But we should also remember that Dr. Stokes made these remarks during the discussion on the *Alluvion and Diluvion Bill*, a Bill in which an attempt was made to codify the law on that subject and when he was refuting the arguments of supporters of Codification of Customary Law, even when the customs were unreasonable and unrighteous.

Tenancy and
mercantile
customs.

Tenancy and mercantile customs which have been acted upon by Judges for the last hundred years or so, have been examined and criticized by the Judges and it is not difficult to find out whether the Judges and the people of the country consider those customs unreasonable. Whether they are unreasonable or not there is no harm in having them digested.

(1) *Gazette of India, Supplement*. Oct. 12, 1878. p. 1600.

Advantages of such codification, according to its supporters are (i) It would bring into greater prominence those leading principles which underlie customary law. It may be said in reply that the customs in British India clearly show that they are the customs of a country where communities and families and not individuals are the units of society. And at the present time when the "movement is from *status* to *contract*" it is not wise to codify the customs which had their origin at a time when individuals had no existence in the eye of law.

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Advantages of such Codes.

(ii) In the Punjab and other places where a large portion of law is customary law, such a code will afford an opportunity of completing the regulations of this system in a direction which would agree with the needs and progressive development of the society, dominant in existing village communities, but which can not be introduced under any system of judiciary law

(iii) Such a code will substitute a large measure of certainty where at present the law is vague and uncertain.

(iv) It will add unity and clearness to the mere accumulations of practice

(v) It will prevent the growth of conflicting precedents confusing alike to the administrator of the law and to the people.

(vi) It would reduce litigation, which is always fostered where laws are doubtful and depend on the view which individual judges may take of the evidence adduced before them

(vii) It will preserve the ancient village systems of British India, because if left to themselves and to the ordinary process of internal development and progress, the transition of ideas will naturally be from communism to individualism, which must necessarily tend to destroy the whole village system, and codification of existing customs would perpetuate the system of customary law, or at least, retard its break up

The supporters of codification of Customary Law also point out the following disadvantages resulting from the want of a Code of Customary Law —(i) A large number of points will necessarily remain unsettled, if the customary law is not codified, until the highest tribunals have had the opportunity of deciding them. (ii) Judicial officers are frequently influenced by their own peculiar idiosyncrasies and thus a large scope is obviously left to the officer presiding in each court to give due effect to his own individual theories.

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(ii) There will be legislation by the judiciary to a very great extent and the evils of judge-made law will flourish (1) The advantages of reducing the customary law into the form of a code according to them are plain and manifold. They say that even Savigny, who was against codification of the civil law as a whole, recognized and conceded that the recording of customary law was a legitimate object of legislation

Such divergence of opinion amongst the authorities makes a careful and thorough examination of the subject necessary.

Customary law being admittedly an important portion of Hindu Law it is necessary that customs and customary laws should be ascertained and digested. But the question is how are the customs to be ascertained? If they are to be ascertained only by the Judges from the examination of private individuals then "the looseness of tradition must lead to contrary opinions, and even when any rule is established, it is likely to be too vague to be easily applied to the case in point. Add to this the chance of corruption, faction, favour and other sources of partiality among the witnesses" (2) The question then arises how are customs to be ascertained? In the same way as it was done by the Government of Bombay in the last century, as it is done by private individuals interested in such study, as it was done by the French Government at the end of the 17th Century. The Government of Bombay appointed Steele specially for ascertaining the customs and usages of the people of Bombay, and helped Borradaile in the compilation of his work and we have got Steele's *Law and Custom of Hindoo Castes*, Borradaile's *Report* and his *Guzrat Caste Rules*.

"Having ascertained" says Dr Wise (3) "where any caste predominated, we went there, and invited the *Purohit* and headman to meet us. Having wrung from them every particular and written down the result at once, we did the same wherever another settlement of the caste was found. On comparing the records, we arrived at the conclusion given in my notes. If still in doubt, we tested the facts by a third or even a fourth visit. I know of no plan so likely to elicit truth as this." Working on these lines Dr. Wise col-

Method of
James Wise.

(1) For examples see "The possibilities of codification in India" in the *Law Quarterly Review* Vol XIV pp. 373, 374 (1898).

(2) Steele's *Law and Custom of Hindoo Castes*. Preface p. IV. Banerjee's *Marriage and Shidhan* p. 11. 3rd Ed.

(3) Risley's *Tribes and Castes of Bengal* Vol I Introductory Essay pp. XIII, XIV.

lected a very considerable mass of original information concerning the religion, customs, and occupations of the population of Eastern Bengal (1). In Sir Herbert Risley's *Tribes and Castes of Bengal* the subject of custom has been treated from the standpoint of the modern science of anthropology and not from the standpoint of the science of legislation. Dealing with the advantages of an ethnological survey Sir Herbert Risley said, "native society is made up of a net-work of sub-divisions governed by rules which affect every department of life, and that, in Bengal at any rate, next to nothing is known about the system upon which the whole native population regulates its domestic and social relations. *If legislation, or even executive action, is ever to touch these relations in a satisfactory manner, an ethnographic survey of Bengal, and a record of the customs of the people is necessary.* The relations of different castes to the land, their privileges in respect of rent, their relations to trade, their social status, their internal organization, their rules as to marriage and divorce, all these are matters intimately concerned with practical administration. For instance, the marriage and divorce customs of the lower castes are constantly coming into the Criminal Courts, and it would be a decided advantage to judicial officers if accurate information could be made available on the subject" (2).

In France, the difficulty of ascertaining the customary law, and the practical inconvenience which ensued, led to a general demand for an authoritative version of such law. In the 15th and 16th centuries Charles VIII and Louis XII of France were great supporters of codification of customary law. The plan adopted by them was this—The principal royal judge of the province was instructed to prepare a preliminary draft with the aid of his subordinate judges and magistrates. Commissioners—two, three or four in number—were then appointed and proceeded to hold local inquiry, at which representatives of the three "estates" i.e. clergy, nobility and commons—were present, and at which the articles of the draft were fully discussed. Articles on which there was a general agreement were at once promulgated, by the Commissioners in the name of the King. Points of difficulty were reserved for decision by the local *Parlement*, and the full text, when finally settled, was formally registered by the *Parlement*. In this way the

Code of Customary Law in France.

(1) *Ibid.* p. XIV.

(2) *Ibid.* p. VII.

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customs of all the provinces had, by the end of the sixteenth century been reduced to a written and authoritative form (1).

Within the last one hundred years good many cases involving questions of customs have been decided by the courts of law and good many customs have been ascertained by the research of private scholars like Dr Wise of Dacca, and also by ethnographic survey of different provinces and by records of the customs of the people. But there has been no authoritative attempt to have the customs and usages digested. Codification is absolutely impossible without Digests of customs and customary law. These Digests will show definitely what the customs are, how much of law in this country is customary and also whether there is any difference of opinion about the existence and value of any particular custom. Now we shall discuss how to remove the uncertainty on questions of customs. There should be first a Digest of all the cases decided by the courts in which questions of customs were involved. Customs about which there is no difference of opinion amongst the Judges should be digested first. Then in cases where there is a difference of opinion the cases should be digested, but the point of difficulty should be reserved for decision by the local legislature and when settled they should again be digested.

Digests of
Customary
Law.

In the next place we should remember that there are many customs which very seldom or never come before the courts. In such cases if the custom is an important one it should also be ascertained with other customs, in the same way as had been done in Bombay by Steele and Borradaile and in the Punjab by Tupper and Rattigan. The ethnographic survey of Bengal begun by the late Sir Herbert Risley should be continued and investigation carried on with a view to find out and ascertain the customs of the people. The object of Sir Herbert Risley's investigation was twofold (i) Scientific (ethnological) and (ii) administrative (famine relief etc) (2). But in future the enquiry should be made from the standpoint of view of lawyers and legislators. Once ascertained, the customs and usages should be digested and the digests should be published for public discussion. Then the digests should be re-edited in the light of public discussion with necessary addition and alteration. These digests will occupy the same position as the Punjab Civil Code did before the passing of the *Punjab Laws Act*.

(1) Iibert's *Legislative Methods and Forms*. 13.

(2) *The Tribes and Castes of Bengal*. Vol I pp V, VII

Thirdly the invaluable works of Steele, Borrodaile, Tupper and Rattigan should be revised in the light of the judicial decisions and new facts (if any) discovered since the publication of those works. LEC. X

The most important objection to the compilation of such digests is the question of cost. True, it will be expensive to have such digests but the expense will not be prohibitive. The plan adopted by Sir Herbert Risley may also be adopted in this case and if the cost of compilation of Sir Herbert Risley's work was not prohibitive, there is no reason to think that costs of compilation of digests of customs will be so.

Objection to such
Digests.
Cost

In the last place I should also say that such compilation should be done by the local Governments and codes based on such digests should be enacted by provincial legislatures as part of their work of special codification.

Thus we find that codification of customary law is not possible at the present time and will not be possible till after the publication of official digests of such law. Such digests, as I have mentioned before, will occupy the same position as that occupied by the Punjab Civil Code before the passing of the Punjab Laws Act. Such compilations says Sir Gooroodas Banerjee are certainly a *desideratum* (1) and sooner they are published the better for the country.

The work of ascertaining and digesting customs is sure to exercise an important influence on the development of Hindu and Mahomedan law. In the first place, the methodical comparison of conflicting customs, the attempt to discover the common principles which underlie them, the systematic grouping and arrangement of the customs when found will train up lawyers and jurists who will be imbued with the principles required for successful codification. In the second place the customs thus ascertained, digested and promulgated, will no doubt purport to be, and substantially will be, a reproduction and declaration of existing customs, but the Digests, being promulgated by the authority of the Government, will prepare the mind of the people of British India, for the exercise of a systematic control by the supreme legislative authority over the domain of private law (2), a very large portion of which is still uncodified. The subject of codification of the personal laws of the Hindus and Mahomedans will be dealt with in the next two lectures.

Use of such
Digests.

(1) *Hindu Law of Marriage and Shidhan.* 3rd Ed p. 12.
(2) *Legislative Methods and Forms.* p. 14.

LECTURE XI.

CODIFICATION OF THE PERSONAL LAWS OF THE HINDUS AND MAHOMEDANS.

Digests of Hindu and Mahomedan Laws.

“The principle of decision” says Sir William Jones (1) “between the native parties in a cause, appears perfectly clear, but the difficulty lies in the application of the principle to practice, for the Hindu and Mahomedan laws are locked up for the most part in two very difficult languages Sanskrit and Arabic, which few Europeans will ever learn, because neither of them leads to any advantage in wordly pursuits; and if we give judgment only from the opinions of the native lawyers and scholars, we can never be sure, that we have not been deceived by them. It would be absurd and unjust to pass an indiscriminate censure on so considerable a body of men, but my experience justifies me in declaring, that I could not with an easy conscience concur in a decision merely on the written opinion of native lawyers, in any cause in which they could have the remotest interest in misleading the court; nor, how vigilant soever we might be, would it be very difficult for them to mislead us, for a single obscure text, explained by themselves, might be quoted as express authority, though perhaps, in the very book from which it was selected, it might be differently explained, or introduced only for the purpose of being exploded.” In suggesting the remedy for this evil Sir William Jones said “If we had complete Digests of Hindu and Mahomedan Laws, after the model of Justinian’s inestimable *Pandects*, compiled by most learned of the native lawyers, with an accurate verbal translation of it into English, and if copies of the work were deposited in the proper offices of *Sudder Dewany Adawlut* and of the Supreme Court, that they might be occasionally consulted as a standard of justice, we should rarely be at a loss for principles at least, and rules of law applicable to the cases before us, and should never perhaps be led astray by the *Pandits* and *Maulavis* who would hardly venture to impose on us, when their imposition might so easily be detected” Sir William Jones, for his own use had a copy of Hallhed’s

Remarks of Sir William Jones.

(1) Letter from Sir William Jones to Lord Cornwallis. Dated March 19, 1788. Lord Teignmouth’s *Memoirs of Sir William Jones* pp. 306, 312.

Genloo Code attested by the Court Pandit of the Supreme Court as good law (1). LEC. XI

“Nothing” says Sir Francis Macnaghten (2) “but an ascertainment of the law can prove a corrective of this evil” Here also we find that the object of codification of Hindu Law was to meet the administrative exigencies Non-Hindu Judges were entrusted with administration of justice and they were unfamiliar with the usages and customs and the written law of the people, they had to depend on the interpretation of Hindu and Mahomedan law by the Court Pandits and Maulavis which the European Judges always viewed with suspicion, not because the interpreters were open to corruption, but because the subject-matter was so intricate and capable of different interpretations. Hence there was a demand for codification. This was at the end of the 18th century and now at the beginning of the 20th century we have not only the authoritative Sanskrit treatises translated into English but have such eminent Judges as Sir Gooroodas Banerjee, Sir Ashutosh Mookerjee Sir Subramania Iyer, Sir Muthusami Iyer, Sir Romesh Chandra Mitter, Sir Chandra Madhub Ghose, Sir P. C. Chatterjee, Sir P. C. Banerjee, Justices Telang and Ranade, Dwarka Nath Mitter and Sarada Charan Mitter well versed in Hindu Law and modern Jurisprudence It is not to meet the administrative exigencies so much as to develop Hindu and Mahomedan Law that codification is necessary But before proceeding any further let us examine the nature of these two different schools of law and ascertain whether they are capable of being codified First let us ascertain the nature of Hindu Law.

“Hindu law” says Sir Gooroodas Banerjee (3) “is a body of rules intimately mixed up with religion, and it was originally administered for the most part by private tribunals. The system was highly elastic, and had been gradually growing by the assimilation of new usages and the modification of ancient text-law under the guise of interpretation, when its spontaneous growth was suddenly arrested by the administration of the country passing to the hands of the English, and a degree of rigidity was given to it which it never before possessed.”

(1) “I made the pandit of our Court read and correct a copy of Halhed’s book in the original Sanskrit, and I then obliged him to attest it as good law, so that he never now can give corrupt opinions without certain detection.” Teignmouth’s *Memoirs of Sir William Jones*. p. 277.

(2) *Considerations on the Hindoo Law*. Preface XII

(3) *Hindu Law of Marriage and Stridhan* 3rd Ed. p 7.

L.A.C. XI

“We are not prepared to hold” says Justice Sir A. T. Mookerjee (1) “that the rules of Hindu law are so inelastic as to be capable of application only to such descriptions of interests in property as formed the subject-matter of transactions at the time when the rules were first formulated. Indeed if the rules of Hindu Law were so narrowly construed and applied it would be impossible to administer them, because in any case, the courts would be called upon to hold a preliminary enquiry as to when a particular rule was first laid down and also as to what kinds of interest in property were recognized at that time.”

Not exhaustive

The Hindu law system is not, and does not profess to be exhaustive ; on the contrary, it is a system upon which new customs and new propositions, not repugnant to the old law, may be engrafted from time to time, according to circumstances and the progress of society. “A king” says Manu (2) “who knows the revealed law, must enquire into the particular laws of classes, the laws or usages of districts, the customs of traders, and the rules of certain families, and establish their peculiar laws, if they be not repugnant to the law of God ” Something of the same expansive principle is to be found in the rule well-known in the Bengal school, that many things which are forbidden and wrong are, nevertheless, to be upheld as valid, if actually done. Questions of Hindu law never have been, nor will be, decided with reference solely to what the law was when originally propounded by Manu, or the very earliest writers. The Hindu law, which the courts administer, and are bound to administer, is that which they, availing themselves of all the sources of information at their command, find to be the Hindu law as recognized and accepted and acted upon by the general body of Hindus for the time being (3). That the system of Hindu law was elastic is evident from the history of growth and development of Hindu law, which may be divided into three periods. In the *first* period the *Srutis* the Vedas were the only authority. Then in the *second* or *Smriti* period Manu and other Rishi commentators were authorities *per se*. In cases of conflict between the texts of *Srutis* and *Smritis*, some subterfuge was resorted to give predominance to the *Smriti* text and *Vedic* text was shelved away as unsuitable to the conditions of the age. In

(1) *Ramgopal v Narain* (1905) 33C. 315, 319.

(2) Ch. VIII. 41.

(3) *Krishnakamini v Ananda*. (1869) 4 B. I. R. 231, 287 *per* Macpherson J.

the *third* period commentaries such as the *Mitakshara* and *Dayabhaga* &c. appeared and became books of authority. "Every Hindu" says Sir Gooroodas Banerjee (1) "appeals to the *Vedas* as the ultimate source of his law and religion. though it may be said, without the slightest exaggeration, that his actual practices at the present day differ from those enjoined in the *Vedas* as widely as the language he now speaks differs from the language of those sacred writings."

The original authorities on Hindu law are the *Srutis* or the *Vedas*, the *Smritis* or the codes of law and the commentaries. The *Vedas* are a body of literature, vast and various, written in a language which differs from the Sanskrit of *Kalidas* and of *Bhavabhuti*, or in other words, from the modern Sanskrit, somewhat in the same way as the language of Chaucer differs from that of the English literature of the present day; that the body of Sanskrit literature known as the *Vedas* is partly metrical, but mostly in prose, the different parts of either the metrical or the prose portion were not written at the same time; though theoretically and from the Hindu point of view, they are all emanated from *Brahma*. Some parts of the said body of literature have embodied in them precepts of law; *Manu* and others are credited only with having collected, expanded, and put these precepts, often obscure and sometimes allegorical, into the form of systematic codes (2).

Centuries ago this theoretical *status* of *Manu* and other sages as mere expounders of the law promulgated in the *Vedas* had become, practically, so far modified that the sages had come to be regarded as authorities *per se*. If a doctrine of law could be supported by citing a text of *Manu* its title to general acceptance would have been hardly questioned even in those days, even then reference to the original *Vedas*, notwithstanding that they were regarded as the foundation of all that *Manu* had laid down, for the purpose of verifying whether *Manu* was right, whether the law as propounded by him was consonant to the principles of law to be found in the *Vedas*, had become obsolete. True, where the *Vedas* and the *Smritis* are to be found in conflict, there the *Vedas* are to be followed. But this principle was subject to a qualification, even at the time we are speaking of; this qualification was that the authority of the promulgators of the *Rishi* Institutes had become so firmly established and people had become so little accustomed to see their authority questioned,

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Original authorities.

Development of Hindu Law.

First period.

I *Sruti* period.II Period of *Rishi* Institutes.(1) *The Hindu Law of Marriage and Stridhan*. 3rd Ed. p. 8.(2) *Kullukabhata on Manu*. I 1.

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that even if a text from the *Smṛiti* was found inconsistent with or contradictory to a rule from the *Vedas*, some means were resorted to, to give force to the *Smṛiti* and the *Veda* was shelved away as unsuitable to the conditions of the age.

III. Period.

Mitakshara and
other
commentaries.

The original position of *Manu* and the other *Rishi* expounders of law had been completely changed at the time when the commentaries, such as the *Mitakshara* and others, appeared and became books of authority. The compilers of these commentaries never think of verifying what the *Rishis* have laid down with what is contained in the *Vedas*. They never entertain the supposition that the *Rishis* could possibly lay down a single rule which contradicted the *Vedas*. Even where they notice any conflict between the *Vedas* and the *Smṛitis*, they commonly explain it by supposing the existence of some peculiarity in the conditions of the age for which the *Smṛiti* rule was promulgated, which conditions, according to their opinion, precluded the application of the Vedic rule. Thus we find that with these commentators, the *Rishi* authors of the institutes of Hindu Law were the ultimate referees on all points of law.

Foundation of
British
Empire
in India.
New era in the
History of
Hindoo Law.

Such was the state of things when the foundation of the British Empire in India brought about a new era in the History of Hindu Law. The British administrators of the Brahminical law felt themselves altogether unable to perform the task of administering the same, they therefore had recourse to constant help from *Pandits* acquainted with the Sanskrit works in which their law was to be found. But no learned Pundit was willing to explain the principles of Hindu law to the British administrators (1) because they thought it derogatory to be employed by the Government and to teach Sanskrit to non-Hindus. However this difficulty was soon overcome and Pundits though not the best and most learned, were found who were willing to serve as the interpreters of law to the British Judges and to help Halhed in his compilation of *Gentoo* law. But by and by the separation between the ostensible and the real administration of law was found to be an extremely unsatisfactory arrangement. Attempts were also made to have the works, accepted by the people as authorities on Hindu law, translated into English. Thus, a few select treatises, such as the *Mitakshara*, the *Dayabhaga*, and the *Vyavahara-mayukha* were brought into prominence. These treatises were no doubt accepted as authorities in the respective territories, where

Smṛiti and *Rishi*
commentators
substituted by
later day
commentators.

(1) Halhed's *Gentoo Law*, Preface XXXV.

they now obtain, even before the commencement of the British administration of Hindu law; but they were certainly not held as infallible guides. A particular doctrine of Hindu law used to derive a great part of its strength and acceptability from the fact of its having been adopted in one of those treatises, but the main support of the doctrine was considered to be the sound argument upon which those commentators rested the particular interpretation of the *Rishi* text quoted by them. It is since the administration of justice was taken up by the British Judges, that the said treatises have come to be regarded as infallible guides; and latterly, the Privy Council have expressly laid down that the duty of an European Judge is not so much to see whether a particular doctrine is fairly deducible from the earliest authorities as to ascertain whether the said doctrine is conformable to the treatise of the particular school of law which is to govern the case (1). Thus at the present day what the lawyers and the judges are required to do, is not to enquire whether the texts of Manu or of any other sage sanction a particular proposition of law, but whether that proposition is sanctioned by the *Mitakshara* or the *Dayabhaga*.

Now let us see when were these later day commentaries, which are governing authorities now, compiled. Let us I *Benares School*.
begin with the *Benares school* :—

1. *Mitakshara of Vijñanesvara*. Latter half of 11th century.
2. *Vishvesvara Bhatta* author of *Subodhini* and *Madana Parijata*; flourished about the latter half of the 12th century
3. *Madhava Acharyya* author of a commentary on the *Parasara Smriti*, 14th century.
4. *Kamalakara* author of *Vivada Tandava* (1612 Circa).
5. *Nanda Pandita* author of *Keshava Vaijayanti* and a commentary on the *Mitakshara* (1599-1633).
6. *Mitra Misra* author of *Vira Mitrodoya* (Beginning of 17th century).
7. *Lakshmi Devi* better known as *Balam Bhatta* author of a commentary on the *Mitakshara* (Latter end of 17th century).
8. *Lakshmidhara*. Author of *Kalpataru*. (14th century).

(1) *Collector of Madura v. Mutu Ramalinga* (1868) 1 B.L.R.P.C. 1; 12; 10 W.R. P.C. 17.

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II Dravida School

Dravida School.

1. *Vijnanesvara.*
2. *Devananda Bhatta* author of *Smili Chandrika.*
Middle of the 12th century.
3. *Madhava Acharyya,* author of a commentary on
Parasara Smili 14th century.
4. *Pratapa Rudra Deva,* author of *Saraswati Vilasa.*
Beginning of the 14th century.
5. *Varada Raja,* author of *Vyavahara Ninnaya.* End
of the 16th century.

III. Mithila
School.*Mithila School.*

1. *Vijnanesvara.*
2. *Chandesvara,* author of *Vivada Ratnakar.*
1314 A.D.
3. *Vachaspati Misra,* author of *Vivada Chintamani.*
Beginning of 15th century.

IV Bengal
School.*Bengal School.*

1. *Jimulavakana,* author of *Dayabhaga* Beginning
of 15th century.
2. *Raghunandan,* author of *Dayatatva* Beginning
of 16th century.
3. *Suknshna,* author of *Dayakarma Sangraha.*
Beginning of 18th century
4. *Jagannatha,* author of *Vivadabhangannava* (the
original of Colebrooke's Digest of Hindu Law)
end of 18th century.

V. Maharashtra
School.*Maharashtra School.*

1. *Vijnanesvara.*
2. *Nila Kantha,* author of *Vyavahara Mayukha.*
17 century.
3. *Madhava Acharyya.*

VI. Guzrat School

Guzrat School.

1. *Vijnanesvara,* author of *Mitakshara*
2. *Nilkantha,* author of *Vyavahara Mayukha*

From the above list it is clear that almost all the commentaries on Hindu Law which govern the personal laws of the Hindus were composed between the 11th and 18th century when the country was governed by the Mahomedan Emperors or the British Government and not by Hindu Kings. True, these commentators were either Hindu Kings under the Mahomedan Emperors or subjects of Hindu Kings under the Mahomedan Emperors. It is clear from these facts that it is erroneous to suppose that Hindu law cannot be now changed, developed or codified.

Now the question naturally arises "How is it that

though India was under the Mahomedan Emperors Codes LEC. XI
and Commentaries on Hindu Law were compiled in different parts of India, that after the beginning of the British rule in this country and during the 19th century there was no codifier of or commentator on Hindu Law?"

Medhalithi, *Bhoja Raja*, *Bishvanuṣa*, *Srikara* and other commentators laboured for the reconciliation of the several Smritis before the time of *Vijñanesvara*. When *Vijñanesvara's Mitakshara* was published at the end of the 11th century it was accepted as authoritative almost throughout India. But within a century *Devananda Bhatta* founded the *Dravira School*. In another hundred years *Chandeshvara* founded the the *Mithila School*. In Bengal *Jimutavahana* and *Raghunandana* effected the most important revolution in the 15th and 16th century. In the 15th century there had been great rivalry between the *Pandits* of Nadiya and those of Mithila. In logic (*Nya*) the *Mithila Pandits* admitted the superiority of the *Nadiya Pandits* and came to Nadiya to learn the *Nya Shashtra* or logic. But in law, the two schools never coalesced. The *Mithila Pandits* adhered to works of *Chandeshvara* and *Vachaspati*, while the *Nadiya Pandits* adopted the works of *Jimutavahan* and *Raghunandana*. Thus we find that in the 15th Century *Jimutavahan* changed the personal laws of the Hindus of Bengal, in the 16th Century *Raghunandana* took the place of *Jimutavahana*. In the 17th Century there was very little change in Hindu Law in Bengal, but in the 18th Century we find that *Srikrishna* and *Jagannatha* amended and codified the Hindu Law.

These compilations were made to bring Hindu Law in a line with the new order of things by incorporating new customs and discarding obsolete ones. That this was the object of these compilations is shown by what is contained in the works themselves. A striking example of this object is to be found in a passage in *V'ramitrodaya* which has been noticed by Justice Sir Ashutosh Mookerjee in *Basanta v. Jogendra* (1). In it, the author gives as a "reason against the acceptance of the view of the *Mitakshara*" with regard to the person with whom reunion is permissible "the fact that if that were so, then reunion with the daughter's son and the like, which is recognized by practice of all people, would become improper." Then again *Vijñaneswara* himself, when discussing the text prescribing unequal shares for sons according to the priority of birth, lays down the

Object of these compilations
To incorporate new customs and discard obsolete ones.

(1) (1905) 33C. 374.

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Why development
of Hindu Law
checked at the
end of the
18th Century.

general principle, that, notwithstanding a sacred text a practice which runs counter to the custom of the people should never be practised and gives several striking examples of those which had become obsolete. So also *Nilkantha*, the author of *Mayukha*, in discussing the age of the boy to be taken in adoption expressly refers to custom as justifying the adoption of a man of any age notwithstanding texts to the contrary. There cannot, therefore, be any doubt that the treatises mentioned above were intended to incorporate new customs and actually did so. Thus we find that the Hindu society is as much subject to the laws of progress as any other. As time advances a change in the ideas and ideals of a nation is inevitable. New ideas naturally give rise to new customs. In the Hindu society, which is seemingly bound by an immutable ancient revelation, when the difference between the new customs and the old becomes marked, the legal conscience of the community comes to feel a reconciliation between the old and the new necessary. Up to the end of the 18th Century this reconciliation was made by putting a new interpretation on the old texts. Those works which did this best came to be regarded as the ruling authority in the particular district or province. But from the time when the British administrators took up the actual administration of justice the Brahmin Pandits of India have been deprived of their "legislative" authority and at the same time the British Indian Legislatures have declined, except in a few exceptional cases, to legislate on the subject of the personal laws of the Hindus with the result that the growth and development of Hindu Law have been checked. The Legislatures have practically left the personal laws of the Hindus untouched and whatever legislation there has been, it has been by the judiciary. It cannot be said that the rules of Hindu Law have been left untouched by the British Indian Government because the British Indian judiciary is slowly and silently but certainly changing them.

No pandit can now set up a new school of law and the schools into which Brahmin lawyers were divided at the time when the British supremacy was established in this country, exist at the present time without increasing or decreasing in number. But for the taking away of the legislative authority from the Brahmin Pandits by the British Government the number of such schools would have either increased or decreased. At the present time there is a tendency among the Pandits of East Bengal to

deny the authority of the Pandits of Nadiya and to establish a new school of their own. But that they cannot do because their "legislative" authority has been taken away from them. LEC. XI

Thus we find that the spirit of change is there in the Hindu community but the Pandits, the former exponents of law cannot incorporate the change with the body of Hindu law because the method of legislation has been changed and the former legislators have been deprived of their legislative authority. The legislative assemblies cannot help in this matter because they have all along kept themselves aloof from all measures of socio-legal reform and also from all measures affecting the rules of Hindu Law.

It should not be supposed that the British Indian Legislatures have no authority to legislate on the personal laws of the Hindus because they have interfered as we have seen before by legislative enactments against *Sati* and infanticide and by the Act validating remarriages of Hindu widows. Then again when the rules of Hindu law are silent on any point, the British Indian Legislatures can legislate on such a point. The right of the legislature to legislate on such branch of law has been mentioned by Sir James Stephen. When the Hindu Law is silent on any subject, the question arises what are the inferences from this silence? There are two sets of inferences; the first is the legal inference and the second a legislative inference. With regard to the legal inference, it is a question for the Courts of Justice to determine. The legislative inference is that in such cases the whole question is open for legislation and the legislature has a clear right to legislate. "Much has been said" says Sir James Stephen (1) "of the obligation of the British Government, not to interfere with the religious institutions of the Hindus. I fully admit that. It is the bounden duty of the Government not to interfere with the old and cherished and conscientious feelings and institutions of the Hindus. I think, we should have no moral right to break up the laws relating to the Hindu family or the custom of adoption; we should have no moral right to interfere with their religious establishments, at all events in their present state of feeling, and I admit that we ought to consider that, in these matters, our legislative discretion is bounded by the general principles of Hindu law. But I will never admit that it is our duty to preserve unaltered every legal right of every kind which our courts may happen to recognize as being vested in Hindus, especially when such rights

Authority of British Indian Legislatures to legislate on the personal laws of the Hindus.

When Hindu Law is silent on any point.

(1) *Abstract of Proceedings* Vol. IX p 326 April 5, 1870.

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arise from the silence of the Hindu law and the partial and incomplete application of the English law to India. This is a state of thing for which it is our duty to legislate with a view to what we must regard as the best interest of those for whom we have to legislate." The next question is how are the British Indian legislatures to legislate on this branch of law. This question should be decided with reference to general principles of policy, and to the general spirit and temper of Hindu society as applied to the subject.

Preparation of
Digests necessary.

But before legislating and codifying the personal laws of the Hindus it is essentially necessary that there should be Digests of cases involving such questions of law and decided by the Courts of Justice. In preparing such Digests care should be taken to collect and digest the cases on any point on which there is no difference of opinion amongst the Judges of the British Indian Courts. It will be better to keep the case law on any point according to one school, say the Bengal School, separate from those according to other schools, though there may be no material difference between these different schools. Thus the law on any point on which there is a current of cases all one way in each school of law should be digested first and codes may be drafted based on those digests. Then the law on those points on which there is a difference of opinion amongst the Judges should be ascertained and the cases on such points should be digested. These cases should be carefully examined and it should be ascertained whether the judge-made law on such points is against the popular interpretation of the law on the subject. It may also happen that the decisions of the Privy Council may be against the popular interpretation of law, in such cases it will be necessary to consider whether the legislature should interfere and alter the law according to popular interpretation.

In passing, it may be remarked that the treatment of the cases in our Law Reports on the lines of the well-known series of American digests, like Lewson's *Monopoly and Trade Restraint Cases* will give us Digests of the kind suggested in this lecture.

Objections to such
codification.

The first objection raised against such codification is the argument which is often raised against codification generally, *viz.*, codification will tend to the stereotyping of rules which under the silent influence of social and political forces are in process of change. This objection has been discussed and dealt with before and we have seen that the importance of this objection has been over-estimated. It

may be further urged by the supporters of such codification that non-codification, at all events, in British India, necessarily implies stagnation and confusion. LEC. XI

That confusion is the result of non-codification is proved by the fact that on various points of law there is difference of opinion amongst the Judges, not only of different High Courts but also among the Judges of the same High Court. If we take the question of succession to the estate of a Hindu prostitute we find that the decisions of Calcutta High Court (1) till 1913 were in conflict with those of Allahabad (2) and Madras High Court (3). We also find that the Judges of the Calcutta High Court held different views on this subject till the decision in the case of *Hari v. Tripura* (4). Then again if we take the question of adoption by Naikins we find a marked difference of opinion between the Bombay and Madras High Court (5) and their Lordships of the Privy Council approve of the principle on which the cases have been decided by the Bombay High Court (6).

Confusion resulting from non-codification.
(a) Succession to Hindu prostitutes.

Then we have the law on the question, whether daughters get an absolute estate in their fathers' estate, in a state of confusion in Bombay. The Bombay High Court has held that in Guzerat where *Mayukha* and not *Mitakshara* is the governing authority, daughters get an absolute estate in such cases, but the Judges of the *Hazur Court* of Baroda in Guzerat (*Hazur Court* in Baroda corresponds to our Privy Council) have held that *Mayukha* is not superior to *Mitakshara* in Guzerat and daughters do not take absolutely. Here is an instance of a British Indian Court administering what it thinks to be Hindu Law but which is really not Hindu Law at all, at least according to Indian Judges. The law on this subject in Bengal and Madras is the same, but the law, according to the Bombay High Court, in Bombay is different from that of other parts of India. Now let us see how this state of things has come about. It has been repeatedly decided by the Bengal Courts, not only in cases under the *Dayabhaga* but also under *Mithila* and *Mitakshara* law that the estate of a daughter exactly corresponds to that of a widow, both in respect to

(b) Do daughters get an absolute estate in their fathers' estate?

Bombay High Court and the *Hazur Court* of Baroda.

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- (1) *Tripura v. Harimati* (1911) 38C 193.
 (2) *Nayan v. Tilak* (1906) 29A. 4.
 (3) *Subbaraya v. Ramasami* (1899) 23M. 171.
 (4) (1913) 17 C. W. N. 679. s. c. 17 C. J. 438. See also *Sundari v. Nemye* (1907) 6 C. J. 372.
 (5) *Mathura v. Esu Naikin* (1880) 4 B. 545 *Venku v. Mahalinga* (1888) 11 M. 393.
 (6) *Ghasiti v. Ghasiti* (1893) 21 C 140.

the restricted power of alienation, and to its succession after her death to her father's heirs and not her own (1). This view has also been taken by the High Court of Madras, after a full examination of the passage in the *Mitakshara* and of the Bombay authorities which have taken a different view. The rulings of these courts have been affirmed by the Privy Council. The law as to daughters' estate in their fathers' property may therefore be taken to be the same as that which governs widows and mothers in every part of India except in Bombay. Mayne in examining the Bombay cases (2) observes "In examining the cases in which this rule has been applied, one is struck by the uniformity of the decisions in themselves, as contrasted with the weakness of the reasoning on which they rest. The absolute right of the daughter, sister etc is rested upon texts of *Mayukha*, which seem unable to support the conclusion which is drawn from them, and upon a continued reference to the definition of the word *Stridhanum* in the *Mitakshara*, from which, since the recent decisions of the Privy Council (3), no inference can be drawn. It is probable that in this case . . . the pundits and judges, in their zeal for written authority, have striven to maintain by express texts a practice which could have been sufficiently supported by long established and inveterate usage."

Law in Guzerat
different from
Mayukha on
the point.

But if we examine the customary law of Guzerat, where *Mayukha* is considered to be of greater authority than the *Mitakshara* we shall find that the customary law of Guzerat is entirely opposed to the construction put upon *Mayukha*. According to *Mayukha* when a woman dies without leaving any issue her property goes to her husband or his heirs, but according to custom prevailing in Guzerat such property generally goes to her father or his heirs (4). In a recent case Mr Justice Atha of the Hazur Court of Baroda has dissented from the decisions of the High Court of Bombay and

(1) *Dava Bhaga* XI 2 §30 Mayne §613 and the authorities cited there.

(2) Mayne §614. p 829 7th Edition

(3) *Sheo Shankar v Debi Sahai* (1903) 30 I A 202 *Sheo Pertab v Allahabad Bank* (1903) 30 I A 209.

(4) See Sir Mangaldas's "*Customs prevailing in the different cities in Guzerat*" (2 Vols.). Out of 215 castes of Guzerat 100 castes have given their opinion that in case the daughter dies without issue the property goes to her father's heirs : 47 castes are in favour of the husband. In 68 cases either there is no reply or that the daughters do not inherit or according to *Shastras*. In answer to the question "If a man dies leaving him surviving his mother and widow who will inherit his property," out of 215 castes, 129 are in favour of mother inheriting, 46 both inherit, 4 only widow inherits, and in 36 cases according to *Shastras*.

has held that Mayukha is not superior to Mitakshara. The usage of Guzerat is different from what is held to be the usage in the Bombay High Court judgment in *Devcooverbaee's* case (1). This view is supported by the following facts.—(a) That the usual practice in other provinces is that the daughter inheriting from the father takes only a limited interest like that of a widow. That is held to be the correct law in all provinces by the Courts except the Courts in the Bombay Presidency. (b) That even in Guzerat before *Devcooverbaee's* case was decided, there were decisions of the courts of Surat and Broach to the same effect (2) and those decisions were given in accordance with the views of the *Shastris* of those times. (c) That this view is held by learned Guzratists who know the customs of that place. (d) That this view is supported by the Hazur Court of Baroda in Guzerat. The Judges of that court are learned Guzratists who know the customs of their own country.

The leading case on this subject in Bombay is *Pranvjandas v Devkurbai* (3) decided on the Equity side of the Supreme Court of Bombay in 1859. There the estate passed first to the widow and then to the daughters. Sausse, C J (4) said as to the latter "What then is the nature of the estate they take? Here again, there are differences of opinion, but, dealing with the question according to the three works I have mentioned (*Manu*, *Mitakshara* and *Mayukha*) we find quoted in the *Mayukha* (5) a passage from *Manu* "The son of a man is even as himself, and the daughter is equal to the son; how then can any other can inherit his property, but a daughter, who is as it were himself." With reference to this point also I consulted the *Shastris* both here and at Puna, and inquired whether daughters could alienate any, and what portion of the property inherited from a father who died separate. The answer was that daughters so obtaining property could alienate it at their will and pleasure, and in this the *Shastris* of both places agreed, both also referring to the above text in the *Mayukha* as their authority for that position. On reviewing all accessible authorities, I have come to the conclusion that daughters take the immovable property absolutely from their father after their mother's

Origin of the rule in Bombay.

1st Case
Pranvjandas v. Devkurbai.

(1) (1859) 1 Bom. H. C. R. 130.
 (2) 1 Borrodailes Rep 173, 194, 2 Borrodailes Reports 329, 362.
 (3) (1859) 1 Bom. H. C. R. 130.
 (4) (1859) 1 Bom. H. C. R. 130, 133.
 (5) Ch. IV. Sec. VIII. para 10.

death ” On referring to the report of the case of *Devkuvarbai* it is clear that the Court took no evidence whatever as to whether the parties were governed by *Mayukha* or *Mitakshara*, nor indeed was there any evidence to show that *Mayukha* was regarded as of paramount authority in Bombay to which place the parties belonged nor was there any evidence that *Mayukha* had that force in Guzerat From the judgment of Sausse, C J. it is clear that his Lordship has not stated that *Vyavahar Mayukh* has paramount authority and over-rules *Mitakshara*, nor has his Lordship held that his decision was based on *Mayukha*, for his Lordship in the commencement of his judgment says “The books of chief authority in this part of India are three, *Manu*, the *Mitakshara* and the *Vyavahara Mayukha* Mr Colebrooke. . . . speaks of the *Mayukha* as being in the West of India, and particularly among the Marathas, the greatest authority after the *Mitakshara* Mr. Borradaile also speaks of these as being the three books generally referred to in this part of the country I had enquiries made of the Shastris here and at Puna, and was informed that these three books have been established by usage as authorities in this part of India, and for the last eighty years have been referred to as such upon the law of inheritance in this Presidency The *Dayabhaga* and *Daya Karma Sangraha*, referred to in Sir Thomas Strange’s preface, are of the Bengal School ” Here his Lordship was laying down the rule that *Dayabhaga* and other authorities of the Bengal School had no force in Bombay Presidency and not that *Mayukha* was of paramount authority in Bombay or Guzerat ; on the other hand he approves of Colebrooke’s statement that in Bombay Presidency *Mayukha* was the greatest authority after the *Mitakshara*

2nd Case.
Vinayak v.
Lakshmibai.

The next case in order of date is that of *Vinayak v. Lakshmibai* (1). The judgment in this case was delivered by Arnould J on behalf of himself and Sir Mathew Sausse, C J on the 28th March 1861 It is in this case we find for the first time that mention is made of *Mayukha* as a high authority on that side of India, while holding that sisters succeed to a separated unmarried brother in preference to other relations of the father. Referring to *Mayukha* Ch. IV. Sec. 8. paras 14-19 their Lordships said “considering the high authority of the *Mayukha* on this side of India, this might alone seem sufficient to establish the position that the sister comes next in order of inheritance after the pater-

(1) (1861) I Bom. H. C. R. 117.

nal grand-mother ; but according to certain commentators L.R.C. XI
of the Mitakshara the sister comes next in order of inheritance after the brother . Of the general authority of the Mitakshara on this side of India, there cannot be, and in fact, never has been, any doubt, and on this point the Mitakshara is not less clear and explicit than the treatise already cited" (1). In this case there is no finding to the effect that *Mayukha* should be preferred to *Mitakshara*, on the contrary the judges held that both authorities agree in the conclusion that the sister succeeds and takes an absolute estate like daughters in *Devkuyebace's* case.

The third case is that of *Navaham v Nandkishor* (2)
In that case Arnould (Acting C J), Forbes and Warden JJ said (3) "Therefore according to the usage of the caste to which she belongs, which usage is in accordance with the Hindu Law, as interpreted by the authorities which are of most weight in the Bombay Presidency, Rukshmani, the only daughter of Lalita, is the heir to the immoveable property which Lalita inherited from her father, Umedram " The authorities referred to in the above passage are to be found at page 212 of the Report, where their Lordships, say "The author of the Mitakshara would appear, therefore, to hold that the property received (or inherited) by a woman from her father after her marriage is woman's property. The opinion of Nilkantha, the author of the *Mayukha*, appears to be the same." Thus we find that the learned judges have not only decided upon the special usage held proved before them but have also relied upon the opinion rightly or wrongly formed by them that *Mayukha* and *Mitakshara* agreed in what they were going to decide.

3rd Case.
Navaham v.
Nandkishor.

The 4th case is that of *Haribhat v Damodarbhat* (4)
in this case the judgment is a short one and there is no discussion as to why and for what reasons a daughter takes an absolute estate

4th Case
Haribhat v.
Damodarbhat

All these cases do nothing more than confirm the previous rulings in 1 Bom. H. C. R. 117, 130, 209

The fifth case is that of *Babaji v Ganesh* (5) It was decided by Westropp C. J. and Kembal J. and is based on the rulings already quoted.

5th Case,
Babaji v Ganesh.

The sixth case is that of *Balakhidas v Keshawdas* (6)

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- (1) *Mayak v. Lakshmi Bai* (1861) 1 Bom. H. C. R. 117, 122, 125.
 - (2) (1865) 1 Bom. H. C. R. 209
 - (3) 1 Bom. H. C. R. 217.
 - (4) (1878) 3B. 171
 - (5) (1881) 5B. 660.
 - (6) (1881) 6B. 85.

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6th Case
Balakhidas v
Keshawdas.

decided by Melville and Kembal JJ. In this case it was held that in those parts of the Presidency of Bombay where the doctrines of the *Mayukha* prevailed daughters took not only absolute but several estates and consequently when without any issue might dispose of such property during life or might devise it by will

Melville J in delivering judgment of the Court observed in p 87 "The decision of the Acting Assistant Judge that daughters take by inheritance a joint estate, with right of survivorship is in accordance with the law as laid down in Madras and Bengal The only question we have to consider is whether the rule is the same on this side of India In this Presidency and especially in Gujrat from whence, this case comes, the *Vyavahara Mayukha* is a principal authority ; and on the strength of Chapter IV. §10 of the *Mayukha* it has become the established rule in the Presidency that the daughters take by inheritance an absolute estate and not a limited interest as they would under the *Mitakshara* (*Mutta Vaduganudha Trevar v. Dora Singa* 8 I. A 99.) The concluding words of the same paragraph viz If there be more daughters than one, they are to divide (the estate) and take (each a share) seems to us sufficient authority for holding that, where the doctrines of *Mayukha* prevail daughters take not only absolute but several estates and consequently not having any issue may dispose of such property during life or may devise it by will." In this case, the case of *Hanbhat v Damodarbhat* (3B 171) was relied upon as the authority of the proposition laid down in this case.

It is clear from this judgment that *Mayukha* became more and more important in the estimation of the High Court of Bombay and that High Court gradually accepted the importance of *Mayukha* as time went on In this case Bombay High Court advanced a step further viz that not only the daughters under the *Mayukha* take absolutely but take an interest separately and not jointly This is a decided departure from the *Mitakshara* because under *Mitakshara* daughters take a joint estate and take the share or interest of one who dies by survivorship whereas according to this decision daughters take separately and in the death of any one of them her share goes to her heirs and not to the surviving daughter.

The seventh case is that of *Bhaginathi Bai v Kahnujirav* (1) This is a decision of a Full Bench of Bom-

bay High Court on a reference made by Sargent C J. and Birdwood J having regard to the Privy Council decision in the Madras case *Mutta Vadu v. Dora Singa* (S I A 99) stating as one of the reasons of reference *viz* “For the defendants however it is contended that since the decision of the Privy Council in the Madras case (the case above cited) the view hitherto prevalent in the Presidency can be enforced only in cases governed by *Mayukha* Ch IV S 13 paras 25—26 and that in cases depending on *Mitakshara* only the heritage of the daughter must be regarded as a life interest the Judicial Committee having distinctly said that *Mitakshara* is not to be construed as conferring on any woman taking by inheritance from male a *Stridhan* estate transmissible to her own heirs The present case is from the Ahmednagar District which is not one of the districts generally held to be subject to the *Mayukha*. The question therefore now arises which in the case of *Dalpat v. Bhagwan* (9 B 301) was left unsettled as that case though subsequent to the decision of the Privy Council was governed by the *Mayukha*” Mr Telang argued the case for the appellant and Mr Shantaram Narayan for the respondent West J. delivered a long judgment West J at p 234 observes “The special and almost paramount authority which the *Vyavahara Mayukha* has gained in Gujrat and the city of Bombay is not recognized in other parts of this Presidency ”

Wherefrom and on what authority His Lordship pays the compliment to *Mayukha* is not to be found any where except what His Lordship himself observes at pp 294—295 in the following words —“The special and almost paramount authority which the *Vyavahara Mayukha* has gained in Gujrat and in the city of Bombay is not recognized in other parts of this Presidency. Yet it must not be supposed that the *Vyavahara Mayukha* presents a development of Hindu Law connected in any particular way with the religious or social system of the Gujratis. Before the Mahratta conquest of Gujrat in the middle of the last century it had long been under Mahomedan rule The customary law of the Hindus had almost dwindled away into mere rude caste usages and the Brahmanical influence had almost perished The *Vyavahara Mayukha* was one of the latest products of the Mahratta School, and had gained the eminent position which it has retained in the Deccan. The Mahratta Brahmins following the Mahratta chiefs into the newly-conquered country naturally took

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7th Case.
Bhagnathu Bai
v. Kahnubhar.

I, EC. XI

their law books with them and of these the *Vyavahara Mayukha* was the most comprehensive and characteristic. In Gujrat it had virtually no rival and as Hindu polity was revived there it took a place analogous to that of the Roman Law in mediæval Europe, with the Mahratta Brahmins as its expositors. Hence arose the somewhat strange consequence that the Mahratta doctrines of the *Mayukha* enjoyed a more undivided sway over Gujrat than amongst the Mahrattas themselves, who had men of wide learning and copious sources of information at hand. Both in Gujrat and the Mahratta country the doctrines of the *Vyavahara Mayukha* and *Mitakshara* are largely tempered by caste customs especially among the lower orders as may be learned from the collections of Steel and Borradaile the latter now in course of publication by Sir Mangaldas Nathubhai."

8th Case.
Jankibai v.
Sundrabai.

The eighth case is that of *Jankibai v. Sundrabai* (1) This case came from Ratnagiri District where it is admitted by all concerned that *Mayukha* is not preferred to *Mitakshara*. Birdwood and Jardine JJ. have held that even under *Mitakshara* law the daughter takes an absolute estate and that on her death the property does not pass on to her father's heirs but to her heirs who according to *Mitakshara* will be the daughter's daughter and not daughter's son.

9th Case.
Rinda Bai v.
Anacharya.

The ninth case on the point is that of *Rinda Bai v. Anacharya* (2). In this case Sargent C J. held that even in Belgaum sisters inheriting from brothers take an absolute estate like daughters and they take it severally and not as joint tenants.

10th Case.
Gandhi Maganlal
v Bai Jadab.

The tenth case is that of *Gandhi Maganlal v. Bai Jadab* (3). In this case a maiden daughter is held to have taken an absolute estate under *Mayukha* and the heritage passed on to her grand-mother (father's mother) on her death as the grand-mother's *stridhan* and she also took an absolute estate. It is a very important question as far as the estate taken by a grand-mother as heir to her maiden grand-daughter is concerned and all arguments were directed to that point. The right of a maiden daughter to inherit was not questioned at all and as to her estate both sides conceded that according to the cases, already noted, she took the property as her *stridhan* and absolutely.

(1) (1890, April 12) 14 B 612.

(2) (1890, December 2.) 15 B. 206

(3) (1899, September 14) 24 B. 192.

So much for the cases decided by the Bombay High LEC. XI Court.

Now, it is admitted by the judges of the High Court of Bombay that Mitakshara is the general authority in Guzerat. It is admitted by West J that Mayukha came into prominence in Gujrat after the Mahomedan invasion and as it is a book written by a Maratha Pundit, the Maratha Brahmmins took it with them to Gujrat and the work acquired influence and acceptance.

But the judgment of Athale J of Baroda court shows that *Mayukha* never acquired such prominence in Guzerat

As to the question what construction should be put upon Mitakshara, West J is entirely wrong in supposing that the Judicial Committee meant to sanction two different constructions, diametrically opposed to each other, of *Mitakshara*, one for Bombay only and another for the whole India except Bengal so far as it is governed by *Daya Bhaga*.

From the review of cases given above we find the Judges of the Bombay High Court to hold that the Judges of Baroda Court and the learned *pandivts* and authors of Guzerat "do not know what their own language means and what their customs are "

European Judges
and questions
of Hindu Law.

Then again European Judges sometimes decide cases without discovering what the real dispute is, and decide them on reasons and arguments which are altogether beside the mark (1)

In many cases the European Judges have failed to appreciate the fact that the customs and usages by which the Hindus govern their lives are in fact the Hindu common or customay law ; and in some cases they have accepted as Hindu law *dicta* which are to be found in some Sanskrit books which happen to have been translated into English, but which do not at all represent the customs and usages which are, or ever have been, in force among Hindus. "It is strange" says Sir Co.nar Petheram (2) "that even now when the best informed among the Hindus have written books in English to tell us what their customs are, English Judges appear to think that these men do not know what their customs are, or know what their own language means."

Opinion of
Sir Co.nar
Petheram C J.

The following are the two important points on which the decisions of the Privy Council are not approved by Hindus themselves as being opposed to Hindu Law.

(1) See the article "*English Judges and Hindu Law*" in 14 *Law Quarterly Review*. 392 (1898) by Sir W C. Petheram.

(2) (1898) 14 L Q R. 394.

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The Judicial Committee has ruled:—(a) that an adoption by a man who has at the time a son either real or adopted is invalid, and (b) that simultaneous adoptions by the several wives or widows of the same man are all invalid, or that, if such wives or widows make adoptions successively, all but the first are invalid.

“It is remarkable” says Sir Comar Petheram (1) “that in each case the English Judges have refused to accept the opinions of the Hindus themselves as to what their own customs are.” The first ruling is based on a misapprehension of the value of *Dattak Mimansa* and *Dattak Chandrika*, and is not in accordance with the precepts of the Hindu sages. The second decision is not only based upon an entire misapprehension of the meaning of Hindu law and usage of adoption, but is opposed to the practice of Hindus all over India. This ruling has very little effect on the custom itself and the only effect of this ruling has been and will be to hand over the property of the people who adhere to their own customs to the money-lenders. “This particular decision” says Sir Comar Petheram (2) “has already destroyed more than one respectable family, whose only crime has been that they have followed the customs of their forefathers, and it will destroy more unless some means can be found by which it can be reversed.” The only authority that can put this matter right is the British Indian Legislature and the only means is by codifying the law on the subject.

Adoption of an only son.

Vyavahara Matrika.

Another point of Hindu law on which there has been a good deal of difference of judicial opinion is whether the adoption of an only son is valid. Up till the year 1899 there was no decision of the Privy Council on this subject, and it had been held by the High Court of Bengal that such an adoption was invalid altogether. But the contrary view had been laid down by the High Courts of Madras, Bombay and Allahabad. But in 1899 the Privy Council settled the question by holding that the adoption of an only son having taken place in fact is not null and void under the Hindu Law (3). But the discovery of *Vyavahara Matrika* of Jimutavahana by the Hon'ble Justice Sir Ashutosh Mookerjee has unsettled the point at least so far as Bengal is concerned; because according to that authority such

(1) (1898) 14 L. Q. R. 403.

(2) (1898) 14 L. Q. R. 404.

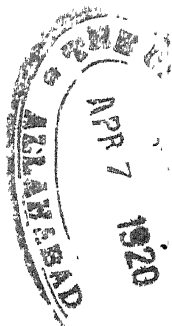
(3) *Sri Balusu Gurulinga v. Sri Balusu Ramalakshmanma* (1899) 26 L. A. 113.

an adoption is totally null and void. Now the question L.E.C. XI is whether the Hindu law on this subject as in force in Bengal, or its interpretation by the British Indian Courts should be given effect to. The law on this point, in Bengal, was settled in one way in 1868, the rule laid down in that year was in force till 1899 when the Privy Council ruled it another way, then in 1912 *Vyavahara Malinka* was discovered which shows that the rule laid down by the Privy Council is not really a rule of Hindu law as prevalent in Bengal. Now it remains for the Legislature to settle it one way or the other

Another cause of confusion, in the absence of codification, is that some of the authoritative texts of Hindu law may be interpreted differently. It has sometimes happened that the same text has been the basis of two contradictory interpretation. One such text is the celebrated one of *Yajnavalkya* "The wife and daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil and a fellow student on failure of the first among these, the next in order is indeed the heir to the estate of one who departed for heaven having no male issue. This rule extends to all persons and classes" (1) In the Courts of British India there are some decisions to the effect that the widow of the last male survivor of an undivided Hindu family succeeds to the whole family property as heir, to the exclusion of other females in the undivided family, who are given only maintenance. It is worthy of remark that the text quoted above is cited by all viz by those who give the inheritance to the widow alone of the last deceased male member of an undivided family, to the exclusion of his mother, as well as by those who give the inheritance to the mother exclusively or to the mother and widow in equal shares.

If we examine the passages in West and Buhler's Digest, in which the inheritance is given to the widow to the exclusion of the mother of the last deceased male, we find that no notice has been taken of the fact that the last deceased male *had not separated* from his father. The learned authors seem to have adopted the principle that the widow of the last deceased male inherits the whole family property irrespective of the question whether he had separated himself from his coparceners or not. Moreover, as they have put

Does the widow exclude other females in an undivided family?



(1) *Mitakshara Vyavaharadhyaya*, folio 55, page 2, line 1. Stokes' *Hindu Law Books*, p 427 West and Buhler p 342. Shyama Charan Sarkar's *Vyavastha Darpan*. 3rd Ed Vol. I p 29.

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West and Buhler

these *vyavasthas* under Chapter II, headed "Heirs of separated person" they seem to imply that the last deceased male should be regarded as a separated person, though he had not separated himself from the united family. Again in their Introduction p. 63 they, after noticing Unobstructed Succession, say "As the descent of property varies under the Hindu Law, chiefly according to the natural and the legal status of the last possessor, it will be convenient to divide the rules on this subject according to the latter principle." They seem to take no account as to whether the "last possessor" had separated himself from his coparceners or not. The point, therefore, for consideration is whether the last deceased male of a Hindu family can be held to be a separated person, though he had not separated himself from the united family. The *Mitakshara*, the *Mayukha* and *Vira Milindaya* and other books which follow the *Mitakshara* are unanimous on the point that the text "The wife and the daughters also etc." prescribes the order of succession to the inheritance of a male who "being separated from his co-heirs and not subsequently re-united with them, dies leaving no male issue" Now the question is whether the attribute "being separated from his co-heirs" can be predicated of the last deceased male who, as a matter of fact, did not separate himself from the united family. It is argued by some that as he had no male coparcener to separate from, at the time of his death, he should be regarded as "separated," though he could not be included under the primary or literal meaning of that word. But the answer to such an argument is that to regard him as "separated" would be to regard him that which he deliberately avoided. Then again we should remember that the attribute "separated" is a relative attribute, and belongs to both the persons who are to be regarded as separated from one another. If the last deceased male is to be regarded as "separated," it invariably follows that the other males from whom he is to be regarded as "separated" must also be regarded as "separated" from him. It would thence follow that by regarding the last deceased male as "separated" every male co-heir in the united family who pre-deceased him without separation would have also to be regarded as "separated," so that every unseparated member of a united Hindu family would have to be regarded as a "separated" member thereof. This *reductio ad absurdum* ought to lead to the conclusion that it cannot be predicated of the last deceased male in a united Hindu family that he was "separated" from his co-heirs.

The question now arises. by what rule, then, is the succession to go in such cases? The answer is as follows:— The last deceased male person is to be held under the circumstances as “unseparated” and the family a united family. The rules for the partition of the estate of a united family at the time of separation should therefore apply. If the surviving females cannot agree to continue as a united family, the same rule by which partition is effected between males when they separate, and divide the ancestral estate should be followed in effecting partition between females of a united family when they alone are the surviving members, unless by special texts a different mode is enjoined or partition prohibited. Thus, each widow, when no male is living in the united family, would represent her husband, and the estate would be divided into as many shares as it would have been had the husbands of those widows been alive and had proceeded to partition. If the system of Inheritance and Partition expounded by *Vijnaneshvara Swami* and his followers, and the constitution of a united Hindu family be considered, the above general rule of partition when females alone survive in the family will be found to be in consonance with reason, justice and the Hindu Law. As *Vijnaneshvara* is a champion of the right of inheritance of wives, he cannot reasonably be supposed to have left unprovided for the case of wives in a united family, when the husbands of all of them should happen to have died. It is an admitted fact that the rules of inheritance in an undivided family are not elaborately given in the *Mitakshara* and other books, but only by way of *dikpradarshana* i.e. indication of the principle to be followed.

The *Vyavastha* given in Shama Charan Sarkar's *Vyavastha Chandrika* (1). “The estate of a man who died while unseparated from, or reunited with, his coparceners, is inherited by his son, fatherless grandson, and the great-grand-son whose father and grand-father are dead; on failure of them by those coparceners or co-heirs with whom the deceased was joint in estate, but not by his widow, daughter, daughter's son, mother, grand-mother and any other female—as they, having no right by birth, could not represent the deceased in the undivided property, nor are they his co-heirs or coparceners by birth.”

*Vyavastha
Chandrika*

In view of the considerations set forth above, this *Vyavastha* requires to be supplemented by the additional

(1) *Vyavastha Chandrika*. Vol. I, p. 216, para 181.

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rule viz. "when no member exists in the united family, each female in the family represents her husband and takes the share which he would have taken." We should also notice that the note in p 34 Pt. II of volume I of *Vyavastha Chandrika* to the effect that the opinion of the Agra Sadar Adawlat Paundit that the wife and daughter-in-law of a deceased Hindu who died after her son without separating from him would inherit the family property in equal shares, is fallacious, is not consistent with the views of *Vijnaneshvara*. For the reasons mentioned above the opinion of the *Agra Sadar Adawlat Paundit* is the correct view of Hindu law as expounded by *Vijnaneshvara* (1)

Unless a rule of partition like the one suggested above be deduced, the spirit and the system of a united Hindu family and of the Hindu Law become violated. In general, the united system of the Hindu family is intended to benefit its members, not to inflict permanent disadvantage on any. It appears against the spirit of the Hindu Law, and also against reason and justice, that the mother, who, when she has several sons and they divide, is entitled to a share equal to that of a son, should lose that share and get mere maintenance when only one son should happen to live. Those who know intimately the system and working of a united Hindu family will easily realize that the mother-in-law is one of the principal venerable relatives to whom a daughter-in-law is to perform her duty. In that system, the mother-in-law is the highest object of veneration and duty to the females of the family, as the father-in-law is to all. The *maternal family* is a special object of consideration with the Hindu lawyers. She is the only female that gets a share equal to that of a son. Thus the decisions of the British Indian Courts in which it has been held that the daughter-in-law excludes the mother-in-law is not consistent with Hindu Law and custom and this confusion can only be removed by the Legislature. We have already noticed that even the decisions of the Judicial Committee may lead to stagnation and stereotyping of law.

Second Objection.

The second objection is that there can be no such codification without giving offence to the people of the country because religion and law are mixed up in this country. True, Hindu Law is not law in the ordinary sense of the word, in Hindu Law rules of civil conduct are not distinguished from religious ordinances. But this fact has deterred

(1) Calcutta High Court has declined to accept the view of the Agra Sadar Adawlat Pandit.

neither the Legislature nor the Judiciary from changing the rules of Hindu Law (1). Sir C P Ilbert, while discussing the question of codification of the personal laws of the Hindus and Mahomedans, says that the supporters of such codification underrate the difficulties of such a task. "Those difficulties arise, not merely from the tendency of codification to stereotype rules which under the silent influence of social and political forces, are in process of change, but from the natural sensitiveness of Hindus and Mahomedans about legislative interference with matters closely touching their religious usages and observances, and from the impossibility in many cases of formulating rules in any shape which will meet with general acceptance. It is easy enough to find an enlightened Hindu or Mahomedan like Sir Syed Ahmed Khan, who will testify to the general desire of the natives to have their laws codified. The difficulty begins when a particular code is presented in a concrete form. Even in the case of a small community as the *Khojas*, who have contrived to combine adhesion to the Mahomedan creed with retention of certain Hindu customs, it has, up to this time, been found impossible to frame a set of rules of inheritance on which the leaders of the sect will agree. And any Code not based on general agreement would either cause dangerous discontent or remain a dead letter. The misconceptions which have arisen about the recent *Guardians and Wards Act*, the authors of which expressly disavowed any intention of altering native law, illustrate the sensitiveness which prevails about such matters" (2)

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Ilbert's opinion.

So far as the first objection that codification stereotypes law is concerned we have already examined it. So far as the second objection, that codification of personal laws of the Hindus and Mahomedans will give offence to them, is concerned, I shall show here that if the three following conditions precedent are satisfied, the force of this argument will be greatly minimised. First, there should be a complete *Lex Loci* of family relations and family property. We have at present, more or less connected with Family Relations and Family Property, the following Acts viz The Indian Succession Act 1865, Hindu Wills Act 1870. The Probate and Administration Act, 1881; The Trusts Act 1882, Civil Marriage Act 1872; The Married Women's Property Act 1874.; The Indian Majority Act, 1875; and Guard-

Conditions precedent to be satisfied.

First Condition.

(1) *Kolita v Kolitany* 7 I A. 115. See also 17C. 498; 19C 412; 20C 116; 22C. 619.

(2) Ilbert's *Government of India* Ch IV. p 310.

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Second Condition.

ians and Wards Act, 1801. Now, steps should be taken to complete the list by passing Acts relating to other branches of this subject. It might be mentioned here that in spite of the misgivings of Sir C. P. Ilbert the Guardians and Wards Act is working smoothly at the present time. *Secondly*, there should be facilities for change of personal laws without change of creed. "The development of the Indian society" says Sir Raymond West (1) "must be mainly on two lines, the line of physical science and the line of economic development. The uncertainty of the family laws of the Hindu was a continual impediment to progress." To avoid this evil Sir Raymond West proposed that it should be competent for any Hindu to take up a status which would bring him, for all economical purposes, for trading and holding property, under the general law. He pointed out that in the working out of the land banks it had been largely the policy of the authorities to refuse to have dealings with any property held by a joint family or in which there were joint rights. That indicated to him that the Hindu family system must be a considerable embarrassment to their progress in the economic sphere.

Then again in Madras, some years ago, *the Gains of Learning Bill* was introduced into the local Legislature with the object of taking away a certain class of property out of the operation of Hindu Law as prevalent in that province.

According to Hindu Law, the *quantum* of education received from family funds by an individual at an age when he could have had no voice in the matter, very often determines whether he is to be the sole owner of any property he may subsequently acquire as a man by his own skill, unaided by any ancestral property, or whether he should share the property so acquired with all those individuals who might be supposed, from their common interest in the original family fund from which he was educated, to have contributed towards the expenses of his education. This *quantum* of education which would enable the other members of the family to claim and appropriate a man's savings as joint property has always been a vexed question. It has given rise to much litigation, and the various Indian High Courts have given conflicting rulings on the subject. This branch of Hindu law is widely believed to be responsible for the demoralisation of Hindu family life, as well as for much dissension and strife. To set this question at rest, and in the interest of Hindu families, Sir Blashyam

(1) *Asiatic Quarterly Review*. (1898) p 419.

Aiyangar, the leader of the Madras Bar, sometimes a Judge of the High Court, and himself a member of one of the highest castes, introduced a Bill into the Madras Legislative Council. He was supported by two other Indian gentlemen, Sir Muthusami Iyer, at that time a Judge of the High Court, and Sir Subramaina Iyer, both orthodox Brahmans. The Bill was under discussion for several years: the opinions of various leading men throughout the Presidency were taken, and it was finally passed by the Legislative Council without any dissentient voice. But though the measure was influentially supported, there was also considerable opposition to it mainly from orthodox Brahmanism. At last the Governor of Madras felt himself compelled to refuse his statutory assent to the Bill, which accordingly never became law. Here we find a large number of Hindus willing and anxious to change their personal law on a certain point but could not do so. If they are allowed to change their personal law without change of creed then their just demand will be satisfied

Then again, in Bengal it is sometimes stated that as daughters' rights to fathers' estate are very much restricted in their nature, it is necessary and desirable to see daughters well provided before the death of their fathers, it is necessary that girls should be married young. But under the present circumstances, heavy demand of dowery, parents' inability to meet the demands of the bridegroom's party, unwillingness of youngmen to marry early, and various other exigencies of time do not allow the desire of the father, to see the daughter provided for by marriage, to be fulfilled. If by some chance or for any reason there is no testamentary disposition the daughter will have no claim on her father's estate except for her marriage expenses. Under such circumstances some people maintain that it will be better to allow any Hindu to change his personal law of succession without change of creed. A Hindu cannot say that questions relating to succession to his estate should be governed by the rules laid down in the Indian Succession Act and what is wanted now is a permissive Act allowing any Hindu to change his personal law on the subject without change of creed. Such a permissive Act will help the solution of the difficult question of the personal laws of Hindus and Mahomedans. But the fate of several recent permissive Bills clearly shows that the passing of such a Bill is very difficult

The Memons of Bombay are a small community of about 8,000 souls who have been governed up to the present time

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Permissive Bills
Memon Bill,
1898.

in the matter of their inheritance by a customary law which has been expounded in a series of decisions of the Bombay High Court. The question of defining and specifying the law by which their inheritance should be guided had been before the Local Government and the Government of India for many years. In 1896 the Government of India were advised by the Bombay Government that the general feeling of the Memon community was that the customary law should govern the inheritance of members of the community as a general rule, but that power should be given to particular members of the community who so desired it to differentiate themselves and by a formal registered declaration pronounce themselves and their families subject to the ordinary Mahomedan law of inheritance. On that understanding a Bill was prepared and introduced into the Governor-General's Council. When the Select Committee sat upon that Bill in 1897 the Legislature was informed that the Memon community if it had originally possessed those desires upon which the Bill had been framed, had altered their opinion, and that the desire of the great body of the community was that it should be altogether governed by the Mahomedan law and not by the customary law which had previously governed it. On that it was considered necessary to consult the community in a very formal way, which was done through the Bombay Government; and the community, by a very large majority, declared its desire that the general law of inheritance to govern them should be the ordinary Mahomedan law and not the customary law. In a matter of this kind Government only seeks to give effect to what is the general wish of a community of the kind, but the committee felt that it was impossible to change the Bill so completely as the new expression of their desires would have compelled them to do. Under the new statement of the opinion it was no longer to be a special act of a special member of the community that he should declare himself subject to Mahomedan law, but it was to be a specific and individual act of a member of the community that he should declare himself subject to the customary law.

In framing a fresh Bill upon these new lines the difficulty presented itself to the Legislature that, if the general body of the community was to be subject to the Mahomedan law any dissenter from that proposition making a declaration that he wished his family to be subject to the customary law would have practically to write himself

down a dissenter from the general Mahomedan law, to proclaim himself unorthodox, and in other words an infidel. This was a position so serious that the Select Committee considered for sometime what possible alternative might be suggested to overcome the natural unwillingness of the dissenters of the community to carry out what they felt to be most suited to the circumstances of their own families. The suggestion which was eventually made was that the Bill should take the shape of giving the Mahomedan law to the whole community, but allowing anybody who wished to remove his own particular family out of the general law to carry out his purposes by a testamentary disposition. Testamentary dispositions under the strict Mahomedan law are very limited and the Select Committee felt that it could not carry through the proposition without once more consulting the Memons of Bombay. The Select Committee recommended that the Government of Bombay should be once more formally consulted in the matter (1). Nothing further had been done in this matter and the whole thing was dropped.

Rejection of Mr. B. N. Basu's Civil Marriage Bill shows that now a days the passing of a permissive Bill is as difficult as it was in 1898. But in 1913 an important permissive Act, *Wakf Validating Act* was passed.

The third condition precedent is that collective assent to each special code of the class affected, should be elicited through some suitable representative machinery. We have already explained what is meant by the terms *general* and *special* codification and now I shall state why this condition precedent should be satisfied. The reason is this that any code not based on general agreement and approval of the people, who will have to obey its provisions, will either cause dangerous discontent or remain a dead letter. But it cannot be expected that each and every individual of the community for which a code is enacted should approve of the code and the utmost that can be expected is that the code should *generally* be approved of by the community. Some people may say that a number of socio-legal enactments has been passed in the teeth of popular opposition and it may sometimes be necessary to do so again; the reply to this argument is that if we examine the Hindu Widows re-marriage Act, the Sati Regulation or the *Lex Loci Act* (the Caste Disabilities Removal Act XXI of 1850), we find that scarcely,

Third Condition precedent.

(1) *Abstract of Proceedings* 1898. pp. 415-416.

if ever, the authorities acted on the principle that they wanted to change any rule of law because it was a rule of Hindu Law and they wanted to substitute the rule of English law for that of Hindu law ; on the other hand they declared that the change is necessary because the existing rule was against the rule of Hindu Law and it was necessary to have the rule of Hindu Law re-established. In some cases they added to the above-mentioned declaration that the existing rule was against the rule of justice, equity and good conscience. Then again we should remember that the part taken by the people of the country—though indirectly—in the work of legislation has become more prominent than before. Spread of education has enabled a large number of people to take an intelligent interest in the affairs of the country and the task of the legislators has become peculiarly difficult and easy at the same time. Difficult because they cannot legislate, if their Bills are unfavourably received by the people generally. Easy because they are sure to find supporters amongst the educated class of people for any measure introduced for improving the social and material condition of the people. It has thus become necessary to have some machinery through which the public opinion may be gauged. With the change in the constitution of the British Indian Legislature within the last quarter of a century and with the introduction of popular element in the legislative assemblies with power to initiate any such measure, the danger of legislation which may give offence to the people of the country has been *minimised*.

Machinery for such codification. Standing Commission to ascertain (i) Rules of Hindu and Mahomedan Law in force (ii) Growth of practices not in strict conformity with existing law (iii) and settle difference of opinion between different sub-divisions of Hindu Law

Now, we come to the question what should be the machinery for codification of the personal laws of Hindus and Mahomedans, without giving offence to the people of the country. I There should be a Standing Commission or Committee ; (i) for ascertaining the rules of Hindu and Mahomedan law which are now considered to be in force ; (ii) for noting the growth of practices not in strict conformity with the existing law ; (iii) for settling the questions on which there are differences of opinion amongst the different schools of Hindu and Mahomedan law. There are differences of opinion not only between *Jimulavahana* and *Vijnaneswar*, but also between *Jimulavahana* and his commentators *Srikrishna* (1) and *Raghunandan* (2). Judges have sometimes accepted the view of *Jimulavahana* and sometimes of his

(1) *Ram v Narain* (1905) 33C 315, 323, 324.

(2) *Poisanno v. Sarat* (1908) 36C. 86, 114 ; 8 C I, J 200.

commentators In *Prosanno v Sarat* (1) Mitra J. remarked that the opinion of *Jimutavahana* and not of *Sikrishna* and *Raghunandana*, should be followed when these commentators have not followed their master. But this statement is rather too broad and requires little qualification "It is impossible" says Justice Sir Ashutosh Mookerjee (2) "to accept the argument that the text of the *Dayabhaga* by *Jimutavahana* must be regarded as in itself an authority absolutely binding on us without regard to the fact whether the doctrine propounded in the text has been accepted as a true exposition of the law and has been sanctioned by usage and without entering into a consideration of the question whether the verse of the *Dayabhaga* on which reliance is placed bears on its face evidence of being spurious, and an interpolation." Thus it has been held that verse 33 of Ch. IV. Section 3 of the *Dayabhaga* is an interpolation *Dayabhaga*, as we have noticed before, acquired its present pre-eminent position in Bengal after the establishment of the British rule in this country The judgment of Justice Sir A. T. Mookerjee, referred to above is really the first step towards putting *Dayabhaga* in its proper place and removing the obstacle which it has placed in the way of development of Hindu Law Here, a text of *Dayabhaga* is rejected—no matter on what ground—it is rejected—which no body could have done even fifty years ago True, the ground in this case is that that text is an interpolation and no part of *Dayabhaga*. But the next step towards the development of Hindu Law will be to hold in such cases, that *Sikrishna* and *Raghunandana* should be followed and not the *Dayabhaga* because the former writers noted and marked the changes made in *Dayabhaga* by custom when they flourished and did really state, in their books what the rules of Hindu Law were in their time For proper administration and development of Hindu Law it is essentially necessary that the Judges of the British Indian Courts should have the power claimed and exercised by Justice Sir Ashutosh Mookerjee in the case mentioned above, until confusion and uncertainty of law are removed by the legislature on the recommendation of the Standing Law Commission. It is necessary that such disputed points should be ascertained and decided by a small Standing Commission or Committee composed of 5 or 9 members like Sir Gooroodas Banerjee, Sir Ashutosh Mookerjee, Sir

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Jimutavahana
and his
commentators

Purna v Gopal.

(1) (1908) 36C 86, 114, 8 C. L. J. 200

(2) *Purna v. Gopal.* (1908) 8 C. L. J. 369, 428.

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Subramania Iyer, Sir Narayan Chandavarkar, Prof. Golap Chandra Shastri, Dr. Rash Behari Ghose and Mr Justice Sankaran Nair. Reports of such Commissions or Committees (if necessary each Province may have one such small committee) should be submitted to the Legislature for necessary action.

(iv) To ascertain popular opinion.

(iv) For ascertaining popular opinion on any question at issue

We have already noticed the fact that the Governor of Madras withheld his statutory assent and prevented the *Gains of Learning Bill* from becoming law because there was opposition to the Bill from a certain section of orthodox Hindus, though the Bill was supported by orthodox Brahmins like Sir Muthusami Iyer and Sir Subramania Iyer, who if they flourished even at the end of the Eighteenth century would have been able to change the law without any help from any legislature. Now the question is whether the supporters of the Bill or those who opposed it did really represent the view of the people. This question involves another question *viz* How are the people to be consulted in a matter like this? In answer to this question, some people suggest that when such measures are introduced, the question should be squarely placed before the country and people should be asked to elect only those candidates for the Legislative Council who are known to represent the popular view on the matter. Such a method will also educate the electorate to the task of continuous self-government. But this method will be of little use unless and until the mass of the population is educated and freed from the undue influence of Zamindars, money-lenders and other interested class of people and able to exercise their own discretion. Then again such a remedy is only a temporary remedy available for a single occasion. But a Standing Committee or Commission for ascertaining the popular view of any question at issue is very necessary, if the administration of India is to proceed on progressive lines.

II. There should be Legislative Councils consisting of members elected under rules which would ensure their representative character and enable them authoritatively to consider and dispose of social questions, with a power of *veto* vested in the President of the Council to be used by him in exceptional circumstances only. The scope of the deliberation of such Councils might be strictly circumscribed e.g. they should not touch any questions of taxation or revenue. It may also be provided that no measure dis-

approved or rejected by the Standing Commission or Committee or without the sanction of the President of the Council should be introduced into the Council or discussed (1).

Each Presidency may have one such Committee consisting of nine members, two Judges and ex-Judges of the local High Court, 2 leading pundits from the seat of Sanskrit learning in the Presidency e.g. Nadiya, Poona, etc., two Maulavis from Aligarh or Calcutta Madrassa and two professors from the local University Law College and a Member of the local Executive Council who should be the mouthpiece of the Standing Committee in the local Legislative Council and should present the Reports and Recommendations of the same in the Council. It may be asked what is the use of having University Professors on the Committee. The reason is that the Universities or seats of learning in ancient India exerted a great influence on the formation and moulding of the national life and also preparing the mind of the people for the reception of new interpretation of old texts of Hindu Law thus establishing harmony in the department of law. The education of future interpreters and administrators of law is of utmost importance for the systematisation and codification of law, because if the future interpreters and administrators are not taught to take a comprehensive view of things and to take an intelligent view of Hindu and Mahomedan jurisprudence and also of comparative jurisprudence it will be difficult to have the personal laws of Hindus and Mahomedans codified (2). The Pandits need not vote on questions of Mahomedan law and the Maulavis need not vote on questions of Hindu law. With Sir Gooroodas Banerjee, Sir Ashutosh Mookerjee, Sir Subramaniya Ayyar, Sir N. Chandavarkar and Professor Shastri it will not be difficult to have such Standing Committees in each of the three old Presidencies.

The only question which now remains to be discussed

(1) See the article "A Native Council for India" by Mr. Justice Sankaran Nair in the *Contemporary Review* for May 1906

(2) In dealing with *Codification of Hindu Law*, Prof. Banamali Chakravarty of Gauhati College mentions special training of *Smartas* as a condition precedent. "With a set of *Smartas*" says Prof. Chakravarty "educated on the lines indicated above, it would be quite possible to compile a new Code of the Hindu religion, which would unify all the divergent sects of the Hindu community. The age of *Raghunandan* is gone. Let the *Smartas* try to produce a new Code, a Code that would be in keeping with the liberal spirit of the ancient scriptures.... Is it too much to expect that the future *Smartas* would be able to compile a Code that would effectively contain all that is good in the new Religions?" *Sanskrit Learning in Bengal*, quoted in *Prabashi*, for *Agrihayan* 1320 B.S.

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Conclusion.

is what the materials are for such codification and this we shall discuss in our next lecture. But before I do so I shall give another reason why such a Committee or Commission should be formed, and that is because such machinery for codifying the personal laws of the Hindus had been tried with success. A "Code" produced by a Committee of learned Pandits, defective though it was in some respect, was the guide, philosopher and friend of the Anglo-Indian Judges for nearly a century. I refer to Hallid's "*Gentoo Code*", now rarely used, but frequently consulted before the publication of Mayne's standard work on Hindu law. This code was compiled by a Committee of 11 Pandits whose names, together with a short history and contents of this Code, will appear in Appendix A.

LECTURE XII.

CODIFICATION AND PROBABLE CLASSIFICATION OF THE PERSONAL LAWS OF MAHOMEDANS AND HINDUS.

The most important point of difference between the English and Hindu law is that while the English law is individualistic and based on the inviolability of contract, Hindu law is rooted in communistic and family relations and based on *status*. The noticeable phenomenon in the legal world in British India is that communistic and family relations are giving way to contract. This process of substitution is going on for nearly a century and is not yet complete. There is much in Hindu law at the present time which is communistic and the desire of some of the educated Indians is, as we have seen in the case of *Madras Gains of learning Bill*, to substitute individualistic for communistic principles. The chief difficulty which the British Indian legislators have to face lies in the fact that changes in law generally mean the substitution of individualistic for communistic principles. This process of substitution cannot be completed in ten or twenty years and at the present time codification of Hindu and Mahomedan personal laws should be mainly based on ancient Hindu and Mahomedan codes and their commentaries. But the provisions of these codes and commentaries cannot be used in their entirety because some of their texts have been interpreted by the British Indian Courts in a way which is quite inconsistent with their interpretation by learned *pandivs* and *maulavis*, and is not in harmony with the sentiments of the people or written texts of the law. In such cases those decisions should be noticed and if necessary, are to be either embodied in the future codes or to be set aside. Then again, changes in the rules of Hindu and Mahomedan law are to be made when necessary on the principle of "justice, equity and good conscience." When the East India Company took up the actual administration of the country, it was provided by different enactments that in the absence of written texts and custom, the judges should decide cases according to the principle of justice, equity and good conscience. In deciding cases according to this principle, the judges wittingly and unwittingly introduced many principles of English law and engrafted them on Hindu and

Materials for
such Codification.

(a) Ancient Hindu
and Mahomedan
Codes and their
commentaries

(b) Case law.

(c) Justice, equity
and good
conscience.

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(d) Tagore
Lectures &c.

Mahomedan law. The result is that the present day codifiers of Hindu and Mahomedan law will have to seek for his materials from these three main sources. But their task, heavy as it appears, has been rendered a little less onerous by such works as Tagore Lectures on *Minois, Hindu Law of Marriage and Stridhan, Law relating to Hindu Widows ; Law relating to Joint Hindu Family, Hindu Law of Inheritance, Hindu Law of Adoption ;* Shyama Charan Sarkar's *Vyavastha Darpan* and *Vyavastha Chandrika ;* Prof. Shastris *Viramitodaya*, the Right Hon'ble Mr. Ameer Ali's *Mahomedan Law*, Sir Roland Wilson's *Digest of Anglo-Muhammadan Law* and Mr. Abdur Rahman's *Institutes of Mussalman Law*. Some of these (Sarkar's *Vyavastha Darpan ;* Sir Roland Wilson's *Digest of Anglo-Muhammadan Law*) are in the form of Digest, but other works like Sarvadhikary's *Hindu Law of Inheritance*, Sir Gooroodas Banerjee's *Hindu Law of Marriage and Stridhan* and Prof. Shastri's *Law of Adoption* should be digested under the supervision of the standing commission or committee suggested in the last lecture and published under the authority of the Government (1), then they will present the different branches of Hindu and Mahomedan law in the form of codes but not as codes. Then there will be public criticism, which will focus the sentiments of the people on certain points and the Government will know what the popular sentiment and opinion are about the provisions of those Digests. They may and should be used in the same way as the *Punjab Civil Code* before the passing of the *Punjab Laws Act*. Then these Digests, like those of Chalmer's *Bills of Exchange* and Pollock's *Digest of the Law of Partnership* in England and Sir Richard Temple's *The Punjab Civil Code* may be used as the basis of future codes. When those Digests will stand the test of public criticism, the public mind will be reassured that the intention of the legislature is not to change the personal laws of the Hindus and Mahomedans without any regard to the cardinal principles of those schools of law, but to ascertain and publish in a handy form for the use of the people themselves and to make the law cognoscible to the people. Once people begin to appreciate the advantages of such Digests they themselves will demand codification. Then it will be time to have codes based on those Digests. Then the objections generally raised against such codification will be found to have disappeared to a large

(1) For objections to official digests and answers thereto see Lecture V.

extent. Such codification will not directly involve questions of social reform and will simply and solely present in a short compass the law which is now to be gathered from old texts, commentaries and mass of case-law. Once popular distrust is removed or minimised the difficulties of legislators will disappear. Then the legislators will be able to adopt any of the three following methods of legislation on this subject. The *first* method will be by what may be called "original legislation" i.e. legislation for setting right certain principles of Hindu law regarding inheritance etc. as for instance in the case of inheritance by sisters and their issue. The *second* method of legislation will be remedial legislation. Legislation for religious endowments will come under this category. The *third* mode will be with reference to cases decided by the highest tribunals and where the decisions are not in harmony with the sentiments of the people or written texts. But, as it has been stated before, these methods of legislation cannot be usefully adopted before the popular distrust has been allayed by the publication and discussion of the Digests mentioned before. A Digest based on the Tagore Lectures of Sir Gooroodas Bancrjee or Prof. Sarvadhikary or Prof. Shastri will be a Digest of laws according to the different schools of Hindu Law and the question will then arise whether it will be advisable to have so many *special* codes. True, it would be far better to have *general* codes applicable throughout the whole of British India, but the project is not practicable for some time to come until the *special* codes based on the Digests or the Digests themselves have shown to the people that there are some important points of difference, not only between the different schools of Hindu law, but also between the different commentaries of the same School, that those differences have arisen because those different schools arose and the different commentaries were composed at different time to meet different kinds of difficulties and to incorporate or reconcile different customs. When people will understand that Hindu Law had never been and should never be lifeless, inert, inelastic body of rules of law and that even at the end of the 18th Century its rules were changed by Pandits to meet the exigencies of the time, then they will not object to the development and codification of Hindu Law. When the popular notion that Hindu law cannot be developed, except under a Hindu King, will be removed by the fact that most of the treatises on Hindu Law, which now govern the Hindus, were composed when the

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Methods of
legislation in
such cases(a) Original
legislation

Its meaning.

(b) Remedial
legislation.(c) Third method
Establishment of
harmony between
judicial decisions
and popular
sentiments.

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country was under the sway of Mahomedan Emperors, then the popular objection to codification of and legislation relating to the personal laws of the Hindus, by the Indian Legislature composed of the representatives of the Government and the people, will disappear and then it will be time to think of *General Codes* of Hindu law and not till then.

Codes of
Mahomedan Law

Let us now take the Mahomedan law and see whether its codification is possible. Now what is the first step towards codification of Mahomedan Law and if it is feasible, how should it be classified. The first step is to have official Digests of Mahomedan Law. We have Sir R. K. Wilson's *Digest of Anglo-Muhammadan Law* and Mr. Abdur Rahman's *Institutes of Mussalman Law* in the form of Digest. These two, with a Digest of the Right Hon'ble Mr. Ameer Ali's Mahomedan Law to be prepared by the learned author himself, or under the supervision of the Standing Commission which has been mentioned before, will form a good basis for Anglo-Mahomedan Codes. Let these Digests be the subject matter of public criticism for a certain number of years then their defects will be found out and those defects may be removed at the time of publication of new editions of those digests, when the subsequent decisions also may be embodied in the Digests. All the three works mentioned above are referred to by the Bench and Bar at the present time and they, though not codes in the true sense of the word, are serving the purposes of codes, are guides both to lawyers and judges and are being used in the same way as the *Punjab Civil Code* was before the passing of the *Punjab Laws Act*.

1st Part.

Now let us see how these Digests should be divided into different parts and what is the probable classification of the personal laws of the Mahomedans for codification. First part of such Codes should deal with the personal and local extent of those Codes

2nd Part.

Second part is to contain law relating to personal relations e.g. (i) Marriage and dower (ii) Divorce. (iii) Parentage (iv) Guardianship. It is only under the head of "rights, duties and liabilities of guardians" that there is any actual abrogation of the rules of Mahomedan Law by the *Guardians and Wards Act*. The question, who are entitled to act as guardians in different circumstances and for different purposes, is left to depend on the personal law of the minor, and the innovations chiefly consist in supplying fresh machinery for ascertaining who would be guardians according to that personal law, and for appoint-

ing guardians in cases where that law itself would vest the right of appointment in the Government. LEC. XII

Section 3 of the *Indian Majority Act* as amended by Section 52 of the *Guardians and Wards Act* supersedes the Mahomedan law to a certain extent.

(v) Maintenance of relatives.

Part III should contain the law of Succession e.g. Administration, Inheritance, Wills and death-bed gifts. 3rd Part.

The subject included in this part belongs partly to the substantive law of succession, and partly to adjective law. Questions of substantive law are decided by Mahomedan law and those of adjective law by the *Probate and Administration Act* or the practice of the Court.

Part IV should deal with the subject of alienation of property e.g. *Wakf*, Gift, Pre-emption 4th Part

Wakf. To remove doubts regarding the validity of *Wakfs*, The *Mussalman Wakf Validating Act* (Act VI of 1913) was passed in 1913. "Whereas" runs the preamble of this Act "doubts have arisen regarding the validity of *Wakfs* created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes, and whereas it is expedient to remove such doubts, it is hereby enacted as follows":—Then follow five short sections of this Declaratory Act, which *does not change* any rule of Mahomedan law of *Wakf*, but only *declares* the right of Mahomedans to make settlements of property by way of *Wakf* and *removes* doubts regarding the validity of *Wakfs*. This Act was introduced by Mr. Jinnah of Bombay a member of the Legislative Council of the Governor-General of India and was opposed by a section of the Mahomedan community in India. History of this Act is of great importance for various reasons. *Firstly*, this Bill was introduced by a "private member" and not by an "official member" of the Council. The *Anand Marriage Act* (VII of 1909) was also introduced by a "private member" and is also a Declaratory Act. These two Acts show how measures of "social legislation" may be initiated by the people of the country and the volume of popular opposition to such measures may be reduced to a certain extent. To a certain extent because the *Mussalman Wakf Validating Bill*, though merely a Declaratory Act and introduced by a Mahomedan member of the Legislative Council was opposed by an important and powerful section of the Mahomedan community Mussalman Wakf Validating Act.

Its importance.
1st Reason.

The oppo-

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sitionists relied on the remarks of Lord Romilly that a Code of Hindu or Mahomedan law or a Digest of any part of that law, if it were enacted as such by the Legislative Council of India, would not be entitled to be regarded by the people of India as the very law itself but merely as an exposition of law. If the position of the oppositionists be examined it will be found that they admit that the decisions of the Privy Council on *Wakf-alal-aulad* had caused dissatisfaction among the Mahomedans in this country. They however view with disfavour any attempt to put matters beyond doubt as far as possible. They gave no substantial reason why the Bill which only sought to remove certain doubts should not be passed. One of course understands the objection to codification of the personal law of the Mahomedans, on the ground that such codification may introduce changes in such laws, but that cannot be said of the present Act because the difficulty which it removes had been created by the Privy Council's misinterpretation of Mahomedan law. If, as admitted by the oppositionists, the judgments of the Privy Council had caused dissatisfaction among the Mahomedans, the question was how the law, misinterpreted by the highest Judicial Tribunal, was to be applied. Obviously the Legislature must come to the rescue. How the oppositionists proposed to override or otherwise to get rid of the decisions of the Judicial Committee was not clear. It should also be remembered that the remarks of Lord Romilly were made at a time when there was not a single Indian member on the Legislative Council and its business was transacted by Europeans only. But the things have changed now and the Bill was introduced not by an European but by a Mahomedan member of the Council and had substantial Mahomedan support. If Sir Sayyad Ahmed or Mr Justice Mahmood were alive it is not difficult to conjecture as to how their opinion would have been ranged or expressed.

2nd Reason.

Secondly we should notice that when a Bill is opposed simply because its passing into law will mean legislation by the British Indian Legislature, we can easily imagine what will be the volume of opposition to any Bill proposing any change in the personal laws of the people. The only means of removing such opposition is to get the people familiar with idea that it is necessary for the preservation and progress of the society, to have laws declared by the Legislature. But besides the objections noted above there were the following objections to codification of the law of *Wakf*.—(i) That *Wakf* is opposed to the general policy of

the Government in respect of the creation of perpetuities. LEC. XII
 (ii) That it is not suitable to the present condition of the country.

We should also notice here the point whether there can be valid *Wakf* of moveable articles e.g. money, shares in joint-stock companies and other modern forms of investment. It was held by Wilson J that shares in limited companies could not be the subject of *Wakf* (1) but the modern view is that they may be dedicated (2).

Mahomedan law of inheritance and pre-emption are complementary to each other. Right of pre-emption is a right which the owner of certain immovable property possesses, as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immovable property not his own, on such terms as those on which such latter immovable property is sold to another person. This right has been recognised by Anglo-Indian Law (3). Pre-emption.

While in the case of Mahomedan law we have Sir R. K. Wilson's *Digest of Anglo-Muhammadan Law* to simplify the task of codification, there is some difficulty in finding any such Digest in the case of Hindu Law. True, there are books like Halhed's *Gentoo Code* (4) and Shyama Charan Sarkar's *Vyavastha Darpan* but they deal with the Bengal School of Hindu law only, and were compiled long ago. And a good many changes have since been made in Hindu law by judicial decisions and discovery of old texts. It is necessary that such works should be revised. Shyama Charan Sarkar's *Vyavastha Chandrika*, a Digest of Hindu law according to the *Mitakshara* also requires revision. Though there are few Digests of Hindu law, the difficulties resulting from their absence have been partially removed by the publication of the texts (with English translations) of a good many treatises on Hindu law. Then again we have the Tagore lectures on different branches of Hindu law from which good and useful Digests may be compiled. The first stage in the work of codification of Hindu law should be the period of preparation of Digests and passing of declaratory Acts containing the rules of law on which there is no difference of opinion amongst the judges and Hindu Law.

(1) *Fatimg Bibi v. Ariff* (1881) 9 C.J., R. 66.

(2) *Kulson v. Golam* (1905) 10 C. W. N. 449. *Ameer Ali's Mahomedan Law* Vol. I. 202—207.

(3) *Nusrut v. Umbal* (1862) 8 W. R. 309, *Gobind v Inayat*. (1885) 7A. 790.

(4) See Appendix A. for its contents, etc.

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Digests of
Hindu Law
Their use.

the judicial decisions are in harmony with the public sentiments. The great use of such enactments will be to familiarize the popular mind with the right of the Anglo-Indian legislature to legislate on Hindu Law. True, with the establishment of the British rule in India, the doctrine has been established that the power of effecting changes in the existing law is vested exclusively in the Legislature, but except in a few rare instances, the British Indian Legislature has abstained from interfering with the Hindu law, with the result that the idea has gained ground that the British Indian Legislature cannot and should not interfere with the Hindu Law. The only reason for such abstention is the policy of religious toleration on the part of the British Indian Government. But legislative enactments, now a days, do not necessarily involve interference with Hindu religion. In the early days of British administration when the Legislature consisted entirely of Europeans mostly ignorant of Hindu law, usages and religion, when it was difficult to ascertain the rules of Hindu law because of paucity not only of English translation but also of publication of Hindu law books, when the people themselves had very little to do with legislation and when education was confined only to a few, there was the danger of interference with Hindu religion by legislation by the British Indian Legislature. But at the present time there are not only the Legislative Councils consisting of educated and leading men of the country—there is also the judiciary consisting of men like Sir Ashutosh Mookerjee, Sir N. Chandavarkar and Mr Justice Chaudhuri, and besides these learned Judges, there are gentlemen like Sir Gooroodas Banerjee and Sir Subramanya Iyer who after occupying the Benches of the different Indian High Courts have retired into private life, and are ready to help the Government of the country by advising it on questions of Hindu law. Then again we have men like Dr. R. B. Ghose, Prof Golap Chandra Shastri, Messrs. S. P. Sinha, B. Chakravarty and other members of the Bar to give expression to the popular sentiments in consonance with Hindu law. Above all we have a large body of educated public opinion which will not be panic-stricken if the Legislature simply undertake to publish official Digests and pass a few declaratory Acts. But at the same time we must remember that there is sure to be some opposition even to such Acts. Rejection of Madras Gains of Learning Bill and Dr. Ghose's Religious Endowment Bill clearly shows that no such Bill will ever secure unanimous support of the

whole Hindu community. Even Mr Dadabhoy's Bill for the protection of women was opposed by certain Hindus of Benares though it was supported by influential Hindu newspapers. No, unanimous support of any such Bill by the Hindu community is an absolute impossibility. L.R.C. XII

We may classify Hindu Law into four main heads for the purpose of codification —(I) Local and Personal application of the codes (II) Family Relations e.g. (i) Adoption (ii) Minority and Guardianship (iii) Succession and Inheritance (III) Family property. (i) Joint family property. (ii) Alienation (iii) Religious endowments. (iv) Trusts. (IV) Hindu females. (1) Marriage and *Stridhan* (2) Hindu Widows

Classification of Hindu Law for Codification.

I. Local and personal application of codes. Existence of different rules of law amongst different classes of people in this country makes the compilation of *General Codes* of personal laws of Hindus difficult if not impossible. General codes are, for some time to come, out of the question and for the present special codes for different classes of people, corresponding to what may be termed different schools of Hindu Law are only possible. This means that codes based on the Bengal School, Mithila School, Benares School, Maharashtra School and Dravira School should be compiled first, then the people will see what the material and also minor points of difference are between these schools. It is true that points of difference are well known amongst some lawyers and Judges, and what is wanted is that more attention should be paid by the universities for the propagation of knowledge of different schools of Hindu Law. When the people of the country will see that most of the points of difference have arisen from causes which are no longer existent or from different interpretation put on the same old texts, their legal consciousness will make them ask for the removal of those differences and then and then only *General Codes* on this subject may be attempted. Until the passing of *General Codes* difference of law, though not its uncertainty, will remain; but this is a necessary evil which can not be done away with at present.

I Local and personal application of Codes.

This part should also contain the Rules of *Mimansa* for interpretation of Hindu law. "The disquisitions of the *Mimansa* bear a certain resemblance to juridical questions, and in fact, the Hindu law being blended with the religion of the people, the same modes of reasoning are applicable, and are applied to the one as to the other. The logic of the

Mimansa is the logic of the law, the rule of interpretation of civil and religious ordinances. Each case is examined and determined upon general principles; and from the cases decided the principles may be collected. A well-worded arrangement of them would constitute the philosophy of law; and this is, in truth what has been attempted in the *Mimansa*" (1). A Digest based on Prof. K. L. Sarkar's Tagore Lectures on *Mimansa* Rules may be used as the ground-work of a Code on this subject.

II. Family
Relation.
(i) Adoption.

II. Family Relation (i) Adoption. Law on this subject is intimately connected with Hindu religion, and any attempt to legislate on this matter is sure to affect Hindu religion on some point or other. But when we remember that in spite of its such intimate connection with religion, the highest Judicial tribunal by its judgments has already legislated on this subject, our apprehension of interference with Hindu religion disappears. It is necessary, because of the existence of some much discussed, important questions of law of adoption e.g. adoption of an only son, successive double adoption, age and *status* of the person to be adopted, that there should be codification of this branch of law.

*Īyavahara
Matika.*

An important contribution on the law on this subject has lately been made by the Hon'ble Justice Sir Ashutosh Mookerjee by his publication of the text of *Īyavahara Matika* of Jimutavahan in the Memoirs of the Asiatic Society of Bengal (2).

Another reason why codification is desirable is that if tested by Sir C. P. Ilbert's empirical tests we find that there are nearly 400 reported cases digested in the official Digest of cases published in 1912. Besides these there are other cases reported in the *Calcutta Weekly Notes*, *Calcutta Law Journal*, *Madras Law Journal*, *Bombay Law Reporter*, *Allahabad Law Journal* and other private Indian Law Reports, showing that questions of the law of adoption are fruitful source of litigation, and most of these cases have arisen in the mofussil because of the uncertainty of law on the subject (3). There remains the important test—how far it is possible to declare the law without raising difficult and delicate questions. If Prof. Golap Chandra Shastri's

(1) *Transaction of the Royal Asiatic Society* Vol. I 457.

(2) Vol. III. No. 5 pp. 277—353 (1912). See Lecture XI.

(3) Most of these cases are on the following points:—(i) Requisites of adoption (58 cases), (ii) Who may adopt (78 cases), (iii) Who may be adopted (80 cases); (iv) Second, simultaneous adoption (25 cases); (v) Effect of adoption (41 cases); (vi) Adoption—construction of wills (23 cases); (vii) Evidence of adoption (15 cases), (viii) Factum Valet as regards adoption (7 cases).

Tagore Law Lectures on the *Hindu Law of Adoption* was not in existence, application of this test would have shown that it is impracticable to have the law on this subject codified. But that book shows what the law is on this subject and what the points are on which there is divergence of opinion amongst the different judges and also the points on which the law is different according to different schools of Hindu Law. This work also shows the points on which there is unanimity of opinion. This book was published in 1891 and since then some important decisions, both by the Judicial Committee and the different Indian High Courts, have been pronounced, and it is necessary that those decisions should be incorporated in this book and necessary alterations should be made. What is wanted is a digest based on a new edition of this work. This book is referred to both by the Bench and Bar in India; and a Digest based on this book prepared by the Standing Commission suggested in the last lecture will make the task of codification of the law on this subject easier for the legislators, not only by providing them with a good foundation for their work but also by reducing the volume of opposition on the part of the people of the country, by showing to them that Hindu religion will not be interfered with by such codification.

(ii) Minority and Guardianship.

Law on this subject has been partially codified by the *Guardians and Wards Act* (VIII of 1890). But it is only under the head of "rights, duties, and liabilities of guardians" that there is any actual abrogation of the rules of Hindu law. The question, who are entitled to act as guardians in different circumstances and for different purposes, is left to depend on the personal law of the minor, and the changes chiefly consist in supplying fresh machinery for ascertaining who would be guardians according to that personal law, and for appointing guardians in cases where that law itself would vest the right of appointment in the Government.

"Nothing" said Sir C P Ilbert in introducing the *Guardians and Wards Bill* "can be further from my intention than to interfere with native customs or usages, or to force Hindu or Mahomedan family law into unnatural conformity with English law. But on looking into the European British Minor's Act, which was framed with special reference to the requirements of what may be called English minors, it appeared to me that almost all its simple and general provisions were applicable, or might with a

LEC. XII

II. Family Relations

(ii) Minority and Guardianship.

Act VIII of 1890

Its aim.

I.E.C. XII

Remarks of
Sir C. P. Ilbert.

little modification be made applicable, to Hindu and Mahomedan as well as to English guardians. Accordingly, what I have done has been to take as my model the European British Minors' Act, which is the latest and fullest of the Indian Acts relating to guardians, and to frame on its lines an Act applicable as a whole to all classes of the community, but containing a few provisions limited in their application to particular classes.....It is not intended by this measure to make any alteration in Hindu or Mahomedan Family Law." To avoid giving offence to the religious susceptibility of the Mahomedans and Hindus the Legislature twice referred the Bill to Select Committees and twice to the Local Governments for their views and the Bill did not finally become law until after Sir C. P. Ilbert left India. Though this Act did not propose to change any rule of Hindu or Mahomedan law, the effect of Section 17 of this Act, which deals with matters to be considered by the Court in appointing guardians, is to introduce a rule which says that the Court, judicially administering the law, cannot say that one religion is better than another (1) It is only the well-being of the infant that is consulted by the British Indian Courts

In English law "when infants become wards of the Court the first and paramount duty of the Court unquestionably is to consult the well-being of the infants, and in discharging that duty the Court recognizes no religious distinctions. If, consistently with the due discharge of that duty, the wishes of the father can be attended to, the Court, having regard to the power with which the law of the country has entrusted the father of appointing guardians for his children, and thereby directing and regulating their future course of life, pays attention to those wishes, but if the wishes of the father cannot be carried into effect without sacrificing what the Court, acting without bias, judges to be for the well-being of the children, those wishes cannot be attended to" (2) This rule has been embodied in Section 17 Guardians and Wards Act (VIII of 1890)

Is this Act a complete Code defining the rights and remedies of wards and guardians? "We find that Act VIII of 1890 (Guardians and Wards Act) is expressly called a consolidating Act. That expression, like the word "Code," implies an exhaustive treatment of all the matters that fall within

Is the Guardians
and Wards Act
a complete Code?

(1) *Mokoond v Nobodip*. (1898) 25C. 881.

(2) *Stourton v. Stourton* (1857) 8 D. M. & G. 760, 771 quoted in *19. W.* (1907) 2Ch. 557, 566.

its purview . . . This Act was intended to be a complete Code defining the rights and remedies of wards and guardians. Indeed the expression used in the preamble points in that direction Act VIII of 1890 is a Code to consolidate and amend the law relating to guardians and wards, which indicates that the intention of the Legislature was the disposal of all the questions touching the relations of guardians and wards by proceedings under the provision of this Act only" (1).

Is a suit for the recovery of minor children maintainable? Or is the procedure under the *Guardians and Wards Act* (VIII of 1890) and by issue of Habeas Corpus (in Presidency towns) the only remedy? This question was raised in *Sharifa v. Mune Khan* (2) and it was held that such a suit would lie. But Sir Lawrence Jenkins C J remarked "When, however, the Legislature comes to amend Act VIII of 1890 (which I trust may be at no distant date), it will, I think, be worthy of consideration whether the procedure under the Act should not be explicitly substituted for an ordinary suit and the position of a father at the same time made clear."

On this point there are some rulings of the Calcutta High Court that under Act IX of 1861 a father who seeks the custody of his children should proceed by an application to a District Court and not by a regular suit in the Court of a Subordinate Judge. On the other hand, in the matter of the petition of *Kashi Chander Sen* (3) Broughton J. held that the Act did "not create any new right or liability but it simply provides a special remedy for a right or liability already existing. That being the case, parties might resort either to the ordinary form of a suit or resort to the special form given by the Act" and he relied on the cases referred to in the *Collector of Pubna v. Romanuth* (4). The High Court of Madras adopted the same view in *Krishna v. Reade* (5). They are all rulings under Act IX of 1861. That Act has been repealed by the *Guardians and Wards Act* (VIII of 1890) and though its provisions have been more or less reproduced in the latter, the language of the *Guardians and Wards Act* is not altogether free from difficulty. The Punjab Chief Court has indeed held in ruling No. 10 of the Punjab Records for 1897 that a father claiming the custody of his children is, since the passing of the

(1) *Shaw Lal v. Bindo* (1901) 26A. 591, 596, 597.

(2) (1901) 25B. 574, 578.

(3) (1881) 8C. 266.

(4) (1867) B. J. R. Sup. Vol. 630.

(5) (1885) 9M. 31.

Guardians and Wards Act, debarred from proceeding by a regular suit, but must proceed by an application under that Act in a District Court. There is however a decision of the Bombay High Court (1) where this point was gone into by Bayley and Candy JJ., and it was held that the Guardians and Wards Act did not debar a Subordinate Judge from entertaining a suit of this nature. In *Sharifa v. Mune Khan* (2) Chandavarkar J said "In the absence of any express enactment to the effect that the special remedy provided by the Guardians and Wards Act was intended by the Legislature to supplant the ordinary remedy, we think we ought to follow the decision of this Court in the case above cited" In *Mokoond v. Nobodip* (3) the proceedings started with an application under the Guardians and Wards Act

Allahabad

The Allahabad High Court in *Sham Lal v. Bindo* (4) laid down that such a suit would not lie and that the Guardians and Wards Act was intended by the Legislature to be a complete Code defining the rights and remedies of the Wards and Guardians. In referring to *Sharifa v. Mune Khan* (5) the learned Judges remarked "However it appears to us that in the judgment of the Chief Justice the law on the subject was not laid down, but reference was made to a past decision which, as far as we know, is not reported.... The case was ultimately decided upon a different point. In the judgment of Mr Justice Chandavarkar, however, certain cases are referred to as indicating, in the opinion of that learned Judge, that a remedy by suit still continued to exist, although a special remedy had also been provided. . . in our opinion they (the cases referred to) do not bear out the conclusion at which the learned Judge has arrived"

To remove the uncertainty of law (substantive and adjective) on this and other points it is necessary to have the law codified. The *Guardians and Wards Act* together with the *Indian Majority Act* has codified the law partially. Now the question is, is it feasible to have the law codified? Examined by the application of Sir C. P. Ilbert's tests we find that there are more than 200 cases digested in the last edition of the Digest of cases reported in the different series of the Indian Law Reports. Besides these, there are other

(1) Appeal from order No 5 of 1892 referred to in 25B. 571, 578, 581.

(2) (1901) 25B. 579, 581.

(3) (1898) 25C. 881, 2 C. W. N. 379.

(4) (1904) 26A. 592.

(5) (1901) 25B. 574.

cases reported in the private Law Reports mentioned above. I, EC XII
 On the subject of the "Duties and powers of Guardians" and on the provisions of the Guardians and Wards Act there are nearly 125 cases. When the portion of the law which has been codified has been the subject matter of so much litigation, it can be easily imagined, how much more fruitful source of litigation is the other portion of the law, not yet codified. Then again, most of these cases had risen not in the Presidency Towns but in the Mofussil because of uncertainty of law on the subject. About the fourth test, i.e. whether codification is possible without raising difficult and delicate questions, it may be said that a portion of the law on the subject has been codified by the Legislature and there is legislation also by the Judiciary without creating any popular dissatisfaction. Though there is difference between legislation by the Legislature and that by the Judiciary—it may be safely stated that there is very little chance of violent opposition to codification of this branch of the law, especially when a code is to be based on a Digest of such a useful book as Trevelyan's Tagore Law Lectures on Minors.

Then comes the subject of maintenance of relatives. There are nearly 200 cases digested in the official digest of cases and most of them are cases from the Mofussil. An official digest of the law on this subject dealing with the nature of this right and the persons who are entitled to maintenance should be prepared (1) Maintenance of Relations

Now we come to the important subject of Succession and Inheritance. Procedural or adjective portion of this branch of Hindu Law has been codified by the *Probate and Administration Act*, *Hindu Wills Act* and *Succession Certificate Act*. It is only the substantive portion of this branch of law which still remains uncoded and the question is whether the British Indian Legislature should touch it. (iii) Inheritance and Succession.
 "The conflicting texts of the ancient lawyers," says Prof Sarvadhikari (2) "and the jarring legal *dicta* of the present day, make confusion worse confounded. By a slow and laborious process of discrimination, this vexed and difficult subject—the Hindu Law of Succession—is being gradually cleared up by the British legislators. The difficulty of the task arises from the fact that Hindu law is to be administered in accordance with the religious teachings of the Hindus. In the Hindu Law of Inheritance, those heirs are

(1) See *Infra*, under heading Marriage and Stridhan

(2) Tagore Lectures on the Principles of the Hindu Law of Inheritance Lec. XII. p. 584.

selected to take the inheritance who are most capable of exercising those religious rites which are considered to be beneficial to the deceased (1). It is this intimate connection of the Law of Inheritance with the Hindu religious law which makes the Law of Succession so difficult to approach. You can easily imagine the difficulties by which the subject is beset—difficulties raised by varying opinions, decisions and comments on conflicting texts. The British courts approach this delicate subject with an unfeigned desire to decide it in harmony with the religious feeling of the Hindus. The Hindu Law, says the Privy Council, contains in itself the principles of its own expositions. Nothing from any foreign source should be introduced into it, nor should courts interpret the text by the application to the language of strained analogies. We thus see with what anxious solicitude this difficult subject is approached by the courts administering Hindu Law. Every step is taken with extreme caution, and every question is decided in harmony with the spirit of written law and in conformity with approved usage." But at the same time it should be noticed that the standard treatises on Hindu Law, after defining the principles on which the Law of Succession is to be based, give only a limited number of examples in illustration of the principles laid down. It would be absurd to suppose that the illustrations alone embody the law, and that the principles only serve to *illustrate* the spirit of the law. It would be more natural to infer that the principles are to be applied in determining the rule which ought to govern every new combination of particular circumstances. "In the absence of any express law, the existing principles should certainly be pushed to their logical consequences. *What is done every day in other departments of law should also be done in construing Hindu Law. We see no reason why Hindu Law should be treated as an exceptional subject, which has nothing in common with other branches of law.* Look at the reason of the law and the analogies derivable, and push the existing principles, in accordance with the Hindu mode of exposition to their natural, because logically derivable consequences. In the exposition of the principles, for instance, upon which the Law of Succession of the Benares School is founded, it would not be proper to confine ourselves to the fourcorners of the *Mitakshara*" (2)

List of heirs given in standard Hindu works not exhaustive.

(1) *Tagore v Tagore*. 9 B L R. 377, 391 (P C.)

(2) *Griidhari v Govt of Bengal*. (1868) 10 W. R. P C. 31. See also Sarvadhikari's *Tagore Lectures*. Lec. XII. p 587.

The ancient Hindu jurists do not give an exhaustive treatment of a given subject, but only give certain broad hints by which the principles explained may be reduced to their logical consequences. They simply show the way—indicate the direction in which we are to proceed in elaborating and illustrating the principles which govern the Law of Succession. An attentive consideration will show that it was not the object of the Hindu legislators to codify the Law of Succession in such a way, that any further development of it would be impossible. "As society progresses, and circumstances change, the old principles must be viewed in a new light and adapted to meet the new social exigencies. It would be wrong to suppose that the Law of Succession has been totally petrified, and admits of no further growth. Grow it must with the growth of society. There is a growing disinclination in the Courts of the country to treat Hindu Law as an inanimate carcase, but to look upon it as a living organism, which is capable of meeting all social requirements. Life has been extinguished in different parts of the old structure, but they are being replaced by others which perform the functions which modern society requires of them" (1)

LEC. XII

Further development of Hindu law of Succession not impossible.

Notwithstanding unwillingness on the part of the Legislature to legislate on this subject, the judiciary by their decisions, in cases not provided for in the Hindu Law, and also in cases where there is a difference of opinion amongst the ancient Hindu jurists, have legislated on this subject. Since the publication of the valuable Lectures of Prof. Sarvadhikary, number of important decisions on this subject have been given by the British Indian Courts. But we should here remember what has already been stated about the disadvantages of legislation by the judiciary. To avoid any misunderstanding on the part of the Hindus it is necessary *first* to have a Digest on the valuable lectures of Prof. Sarvadhikary under the supervision of the Standing Commission mentioned before. Then a few years after the publication of the Digest, there should be *secondly* a Declaratory Act based on the Digest and then *thirdly*, when the popular distrust and misapprehension are removed there should be a Code. But this Code also should be a *special* and not a *general* Code. It is necessary to go through these different stages because of the delicate nature of the task and the slightest error will hinder the progress of codification of the personal laws of the Hindus for a long time

(1) Sarvadhikari's *Tagore Lectures*, Lec. XII. p. 588.

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to come. The people should see with what anxious solicitude this difficult subject is approached by the British Indian Legislature, which will be helped in this difficult task by a Standing Committee consisting of, amongst other members, Pandits whose forebears were their law-givers in ancient times. Different classes of people are governed by different schools of Hindu law and there are various important points of Law of Succession on which there is a divergence of views amongst the Hindu jurists, generally based on the different interpretation of some old texts. It is not practicable to have a *general* Code on this subject at the present time ; and the time for a general Code will not come till the *special* Codes are appreciated by the people and they themselves ask for the removal of the points of difference by the enactment of a general Code

There are nearly seven hundred cases (1) digested in the last edition of the official Digest of cases published in 1912. Most of these cases came from the *Mofussil* and involved difficult and intricate points of law. These cases were the result partly of uncertainty of law and partly of difficulty inherent in the matter in dispute. But it must be admitted that it is impossible to declare the law on this subject without raising difficult and delicate questions. To obviate this difficulty the procedure laid down before should be adopted and the sooner the Digest is published the better. There are other considerations also which make it desirable that the law should be codified. They are (1) Desirability and necessity of removal of uncertainty of law caused by conflicting judicial decisions e.g. (a) whether a bequest to a class of persons some of whom are not in existence and not capable of taking is good or whether the whole bequest is void (2) (b) Whether birth of a son revokes a Hindu Will.

Application
of Sir C. P
Ilbert's tests

Reasons why the
law on this
subject should be
codified.

First reason.

(1) *Inheritance.*

Special heirs (male and female)	233 cases.
Illegitimate children	28 "
Impartible property	33 "
Joint property and succession	16 "
Divesting of and exclusion from inheritance etc. etc. etc.	61 "
<i>Hindu Will.</i>	
Construction of wills	141 "
Power of disposition	35 "
Nuncupative wills etc. etc. etc.	8 "
<i>Succession.</i>	15 "

(2) *Bhagabati v. Kali* (1905) 22 C. 992, 1009 on appeal to the Privy Council (1911) 15 C. W. N. 393. This decision of the Privy Council has settled the point now.

In *Subba Reddi v Doraisami* (1) it was held by Mr. Justice LEC. XII Subramania Aiyar that there was a revocation in such a case but on appeal it was held that the provision of the *Probate and Administration Act* on the subject was exhaustive and there was no revocation in such a case. The arguments in favour of revocation mentioned in the judgment of the first Court are worth considering by the legislature. (c) Whether a gift to an idol to be established after the death of the testator is valid (2).

(II) Secondly. There are important points on which there should be legislative pronouncement e.g. (a) Extent of liability of a Hindu heir to pay the debts of the deceased (i) generally and (ii) when the debts had been incurred for illegal and immoral purposes. The law on the subject in Bombay Presidency has been dealt with by the British Indian Legislature. It has been held by the Allahabad High. Court (3) that it is sufficient, in order to establish the liability of sons to pay a personal debt of their father, if the debt be proved, and the sons cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge. Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditor's remedies for their debts if not tainted with immorality (4).

General evidence of profligacy on the part of the father is not sufficient to exonerate the sons of the debtor from their duty to pay their father's debts (5). Under the *Mitakshara* a son is under a pious obligation to discharge a decree for mesne profits obtained against his father by a person whom his father wrongfully kept out of possession of immovable property (6).

The question whether the burden of proving that the

(1) (1906) 16 M. L. J. 491. See also Lecture VIII How far Codification has touched Hindu and Mahomedan Law, under heading Hindu Wills.

(2) *Bhupati v. Ramlal* (1900) 14 C. W. N. 18.

(3) *Karan Singh v. Bhup Singh* (1904) 27A 16 *Babu Singh v. Bihari Lal* (1908) 30A. 156, 159.

(4) *Nanomi v. Modhun* (1885) 13C 21.

(5) *Kishanlal v. Garuradhrwaja* (1899) 21A. 238, 240; *Chintaman v. Kashinath* (1889) 14B 320. *Babu Singh v. Behari* (1908) 30A. 158, 161. See also *Budive v. Kantee* (1875) 23 W. R. 260, 262. Cf. *Jamsetji v. Kashi* (1901) 26B. 326, 331. See also *Jagannath's Digest*. 305, 309, 311 2W. Mac N 210.

(6) *Peary Lal v. Chandī Charan* (1906) 11 C. W. N. 163, 169; *Natasayyan v. Ponnusami* (1892) 16M. 99, 104.

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creditors had made proper inquiries with a view to satisfy themselves that money was not being borrowed for immoral purposes lies on the plaintiff or not was raised in the case of *Maharaj Singh v. Balwant* (1) but was not decided. In *Babu Singh v. Behari* (2) it has been held that when the son sets up the defence that the debt was incurred for immoral purposes, the burden of proof is on him and not the creditor.

(b) Application of the principle of *Executor de son tort* in the cases of Hindus (3).

(c) Validity of a legacy to an adopted son and an appointee under a power (4).

(d) Family arrangements and the rulings in *Tagore case*. Validity of a bequest to a son's wife, whose marriage took place after the death of the testator but the girl who became the wife was alive at the time of the death of the testator (5).

(e) Succession to the estate of fallen women. Their heirs Grant of Letters of Administration in such cases (6)

Thus we find that codification is necessary for the following special reasons:—(i) To remove the difference of Judicial opinion. (ii) To do away with the decisions which are not consistent with the rules of Hindu Law. Special Codes on this subject may be based on Prof Sarvadhikari's *Tagore Lectures*.

III. Family Property.

III. *Family Property*. (A) Joint family property (B) Alienation of such property. (C) Trusts (D) Religious endowments.

(A) Joint family property.

There are more than 500 cases digested in the official Digest published in 1912 (7). But this number does not include cases on trusts. Most of these cases had arisen in *Moffussil* because of uncertainty of law. On the Law of

(1)	(1906) 28A. 508.	
(2)	(1908) 30A. 157.	
(3)	<i>Radhica v. Bonnerjee</i> (1902) 10 C. W. N. 566 ; 570	
(4)	<i>Bai Mativahoo v. Mamoo bai</i> (1897) 24 I. A. 93 ; <i>Yethirajulu v. Mukuntha</i> (1905) 28M. 362, 375.	
(5)	<i>Natar v. Rainamala</i> (1910) 15 C. W. N. 66.	
(6)	<i>Hari Lal v. Tripura Roy</i> (1913) 17 C. W. N. 679 s. c. 17C. I. J. 438 (F. B.).	
(7)	(i) Presumption as to joint-family	145
	(ii) Nature of and interest in such property	48
	(iii) Position of joint-family manager	17
	(iv) Debts and joint-family business	30
	(v) Powers of alienation by members	79
	(vi) Sale of joint-family property in execution and rights of purchasers	67
	(vii) Suits for possession	2
	(viii) Partition	6
	(ix) Creation of Endowment	23
	(x) Management of Endowments	12

Hindu Joint Family Property we have the Tagore Law Lectures by that eminent Sanskrit scholar and sound lawyer Prof. Krishna Kamal Bhattacharyya. But this valuable work has not been brought up to date. If that is done then a very useful Digest may be compiled from this book. A Declaratory Act based on such a Digest will be a valuable addition to the Indian Statute Book

(B) Its alienation.

On the Law of Trust we have the Indian Trust Act, though of limited application. This branch should also include the law of *Benami* transactions and Tagore Law Lecture by Mr Caspersz on "Estoppel" will supply valuable materials for a Digest. Tagore Lectures on the Law of Trusts in British India may also be used as the basis of such a Digest. But here also we must have the Digest first then after the ascertainment of public opinion we should have either a Declaratory Act (if there is any opposition to and adverse criticism of the Digest) or a regular Code

(C) Trust.

Law of Religious endowments Besides some provisions about procedure to be adopted in cases against the Manager or Shebait of public religious and charitable institutions there is no statutory provision on this branch of law. Mismanagement by *Mohants* and other managers of religious endowments of the trust fund and immoral conduct of some of them have compelled the educated community in different parts of India, to approach the Government of the country with a prayer for codification of law on this subject. That eminent Bengali Lawyer Dr. R B Ghose, a few years ago proposed such legislation. He was supported by the educated men of the Hindu community but his Bill was opposed by some orthodox Hindus, who would have approached Dr. Ghose for his opinion, professionally and would have received his opinion without demur. The Legislature, because of this opposition did not think it proper to proceed with the measure. In 1914 the Government of India convened a meeting of some of the leading Hindus and Mahomedans to consider this matter which is still the subject-matter of correspondence between the Secretary of State for India and the Government of India.

(D) Religious Endowments.

(xi)	Succession in Management	30
(xii)	Transfer of right of worship	15
(xiii)	Dismissal of Manager	6
(xiv)	Shebaitship	2
(xv)	Alienation of Endowed property	40
	Total	522

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IV Hindu females

Marriage and *Stridhan*.

This Part will include the Hindu law of Marriage and *Stridhan* and law relating to Hindu widows. On these subjects we have the Tagore Law Lectures from which useful Digests may be compiled. By applying Sir C. P. Ilbert's tests we find that there are nearly 150 cases involving questions of law relating to Marriage and *Stridhan* and nearly 200 cases in which the rules of law relating Hindu widows were involved. Most of these cases arose in the *Moffusil* as the result of uncertainty of law on the subject. But the main objection against codification of this branch of Hindu Law is its intimate connection with Hindu religion and if we had not the work of Sir Gooroodas Banerjee on the subject which has lately been brought up to date to guide the compiler of a Digest of the law on this subject, its codification would have been an impossible task. The first step towards codification will be a Digest to be compiled from Sir Gooroodas Banerjee's book

Gharjamai

The system of the permanent residence of the son-in-law in the house of his father-in-law as a member of his family, may, in fact, have owed its origin and development to the system of *Putrika-putra* i. e. a son of an appointed daughter who was given in marriage to the bridegroom with the condition that the son born of her would belong to her father. The essence of the matter was that the marriage in such a case did not operate as a transfer of dominion over the damsel from the father to the husband. The system of *gharjamai* is one of comparatively recent growth and it is not strange that the texts to be found in ancient Hindu Law books do not deal with his position and right in the family of his father-in-law. But the absence of texts does not necessarily show that he has no rights at all.

If the system owes its origin to the institution of *Putrika-putra*, one of the twelve kinds of sons recognized by the Hindu Law, there is no reason why a British Indian Court of Justice should refuse to recognize it. On the other hand, when regard is had to Hindu social customs and manners, it becomes obvious that if the contrary view were maintained, considerable hardship might needlessly result.

Then again a *gharjamai* may be included in the term "poor dependent" mentioned in the text of *Manu* cited in the commentary of *Srikishna* on the *Dayabhaga* (Ch. II. para 23) (1)

The following are some of the points, recent decisions

(1) *Govind Rani v. Radha* (1910) 15 C. W. N. 205, 208.

on which should be incorporated in the Digest of law on this subject:—(a) Validity and effect of a marriage between a Hindu and a non-Hindu in England (1). (b) Bigamy (2). (c) Restitution of conjugal rights—where can a Hindu wife live apart from her husband and will still be entitled to maintenance (3) (d) Succession to fallen women (4). The change in the law made by the Indian Divorce (Amendment) Act (X of 1912) should also be noted.

On the law relating Hindu Widows we have the Tagore Law Lectures on the subject by Dr. Troilakhya Nath Mitter. But it was published some time ago and unless it is brought up to date it will be of little use as supplying the materials of a Digest. But the Standing Law Commission (mentioned above) may have it brought up to date and then have a Digest compiled. There are some important cases the decision on which should be incorporated into such a Digest e.g. (a) effect of unchastity. A Hindu mother who has become unchaste after her husband's death does not thereby lose her right to succeed to the property of her son (5) (b) Right of a Hindu widow to make a gift of immovable property to her daughter on the occasion of her *Dwiragaman* ceremony. Upon the authority of the ancient texts and of the commentators, as also upon the judicial decisions there cannot be any reasonable doubt that a gift by a Hindu widow, governed by *Mitakshara* law, of a reasonable portion of her husband's immovable property to her daughter in connection with her marriage is within the scope of her authority as a qualified owner and is binding upon the reversionary heirs of her husband. The *Dwiragaman* ceremony is treated in works of authority as a ceremony of importance closely connected with marriage. There is no substantial difference between gifts made at the nuptial fire or in the bridal procession and gifts made at the time of *Dwiragaman* ceremony. Thus a Hindu widow governed by *Mitakshara* law is competent to make a valid gift of immovable property to her daughter at the time of *Dwiragaman* (6).

From what has been stated above it is clear that most of the Digests to be compiled by the Standing Commission will simply state what the law is according to the Hindu

(1) *Chetti v. Chetti*, (1909) P. 67.

(2) *Emp. v. Lazar* (1907) 30M. 550.

(3) *Dular v. Dwarka*, (1905) 31C. 971.

(4) *Hari Lal v. Tripura Ch. Roy* (1913) 17 C. W. N. 679 s. c.

17 C. L. J. 438 (F.B.)

(5) *Dal Singh v. Dini* (1909) 7 A. L. J. 80.

(6) *Churaman v Gopi* (1909) 13 C. W. N. 994, 1000

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Digests to be prepared by the Standing Law Commission

Codification and educated Hindus.

Unanimous support of the Hindu community impossible.

law-givers and will not introduce any material change in that law. But at the same time we must remember that codification by a Bill which merely improves the form without altering the substance of the law is an impossibility. The draftsman is sure to come across doubtful points of law which he must decide one way or the other. There are also occasional gaps which a codifying bill must bridge over if it aims at anything like completeness. Even if, for the sake of argument it is conceded that these Digests will simply declare the rules of Hindu Law without altering its substance, the legislators will have to discuss bills like Sir Bhashyam Aiyangar's *Gains of Learning Bill*, Dr. R. B. Ghose's *Religious Endowments Bill*, and Mr. Dadabhoy's *Bill for the protection of women and girls* and Mr. Sashagiri Iyer's "*The Hindu Gifts Bill*" and to decide whether these Bills be rejected or passed and if passed whether they should be passed as introduced into the Legislative Council or with any amendment. When we remember that Sir Bhashyam Aiyangar's Bill and Dr. Ghose's Bills, Mr. Dadabhoy's Bill, though supported by most of the Hindu Newspapers, did not become law because of opposition on the part of certain classes of Hindus, we may be sure that almost all the Digests of the Standing Law Commission will be opposed by a certain class of Hindus. But at the same time we must also notice the fact that Bills like the *Gains of Learning Bill*, *Hindu Gifts Bill* and *Religious Endowments Bill* clearly and unmistakably show that the Hindu community or at least its enlightened and leading members clearly see the desirability of codification, or at least legislation on certain important points of Hindu Law. The Government of the country and the Legislature are sure to have their help and co-operation in legislating on Hindu Law, if such legislation is not inconsistent with the principles of Hindu Law. Then the question is "will the Legislature be justified in legislating even in the face of such opposition, insignificant and unimportant though it may be?" or in other words will the Legislature be justified in legislating on such questions without the unanimous support of the entire Hindu community? But imposition of a condition of unanimity will be tantamount to prohibition of legislation in any shape. Such a condition will be intolerable in any country because of impossibility of obtaining unanimous support of the community concerned with regard to any legislative or any other measure. It may be urged that such a condition is essentially necessary in this country

because of the principle of religious neutrality. But the answer to this argument is that this principle was adopted at a time when the British Administrators had no means of ascertaining the views of the people and true rules of Hindu Law—when opposition came from the class of people who are now asking for such legislation—when there was no division or difference of opinion amongst the Hindus themselves and the whole community led by its leading members opposed legislation affecting the rules of Hindu law or custom. But now it is not the non-Hindu members of the Legislature but its Hindu members who are introducing Bills dealing with the rules of Hindu Law and they are supported by a large number of Hindus themselves. Then the position of affairs was, non-Hindu religion was opposed to Hindu religion whenever any question of Hindu Law was discussed before the Legislature and it was incumbent on the Legislature not to proceed with the subject except under special circumstances—but now it is Hindu religion against Hindu religion. Unless it is indisputably proved that the oppositionists represent the true view of Hindu Law on any point in dispute it cannot be said that the Legislature, on the ground of religious neutrality, should not proceed with such legislation. When a portion of Hindu community wants certain legislative enactments which are opposed by some Hindus the argument against legislation on the ground of religious neutrality is not applicable. Then again it may be argued that though the oppositionists are in the minority, and do not hold the true view of Hindu law, it is the duty of the legislature not to legislate and to avoid giving offence to them. This argument, if based on any reason it is this, that it is just and equitable not to legislate in such cases. If the principle of justice, equity and good conscience require that there should be no legislation in such cases, that very principle also requires, for the welfare of the majority of the members of the community, that there should be legislation in such cases

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Principle of religious neutrality

Its origin and meaning.

What has been stated above is based on the assumption that every law is a command of the sovereign, so fully developed in the analysis of Austin, which cannot be associated with the idea of law according to Hindu jurisprudence. The foregoing statement have been made because according to Anglo-Indian Jurisprudence, law is a command of the sovereign and the present theory of legislation in this country is not a theory of Hindu Law but of modern jurisprudence. This change of theory is res-

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Theory of Legisla-
tion in ancient
Hindu jurispru-
dence.

Development of
Hindu Law.

possible for a good deal of the difficulties now met by the Anglo-Indian legislators and administrators. Now let us see (a) whether *the theory of legislation according to ancient Hindu Jurisprudence may remove those difficulties and if it can, (b) what necessary changes in this theory should be made to adapt it to present circumstances.* What is then the old Hindu theory of legislation and how was Hindu Law developed? According to Hindu Jurisprudence laws are regarded as commands not of any political sovereign, but of the Supreme Ruler of the Universe. While, on the one hand, the belief in the emanation of Hindu Law from the Deity "made it in theory absolutely unalterable by any temporal power, on the other hand, the very absence of temporal sanction in the majority of cases, and the feebleness of its connection with temporal authority, rendered it practically a system most readily adaptable to the varying wants of society." "Now" says Sir Gooroodas Banerjee (1) "the changes which have taken place in the course of time, both in the internal structure and the external surroundings of Hindu Society, must have continually presented motives for deviating from the rules laid down in the primeval Code—motives which could be but insufficiently counteracted by the spiritual sanctions by which most of those rules were enforced. This led to innovation; and what was excused as necessary or desirable innovation in one generation, came to be revered as custom in the next; and thus have been brought about, slowly but steadily, those numerous and important changes in the Hindu law, which may be seen at a glance by comparing the prevailing practices of the Hindus with those enjoined or reprobated in the Institutes of *Manu* or any other ancient sage. . . . To this mode of development of the Hindu law by the displacement of old and obsolete rules by growing usages, the interpretation of texts by commentators has served as an important auxiliary. Each commentator, under the guise of interpretation, often moulded the ancient texts according to his own views of justice or expediency. And as the authority of each commentator was received in some places, and rejected in others, there arose what have been styled the different schools of Hindu Law." *Manu* himself, to render Hindu law most readily adaptable to the varying wants of society, provided "if it be asked how it should be with respect to (points of) the law which have not been specially mentioned, the answer is that which Brahmans,

(1) *The Hindu Law of Marriage and Stridhan.* 3rd Ed. p.5.

who are *sishtas*, propound shall doubtless have legal (force) Those Brahmans must be considered as *sishtas* who in accordance with the sacred law have studied the Veda together with its appendages, are able to adduce proofs preceptible by the senses from the revealed texts" (1). Whenever the *sishtas* sanctioned any change, such a change was at first looked upon as necessary or desirable innovation. The legal consciousness of the people tolerated though it did not welcome such changes, because they were approved of by the *sishtas*. In course of time such changes came to be revered as customs. The *sishtas* had the authority to sanction any innovation of which they approved.

The next question is whether there is any means of adapting this method of developing Hindu law to present circumstances.

Adaptation of the method to present circumstances.

The law of progress—slow yet steady progress, was a characteristic of Hindu Law till the end of the 18th Century and for reasons mentioned before, that progress has been arrested and it is the imperative duty of all those, who are responsible for the welfare of that community, to see that the causes which arrested the progress, should be removed as soon as possible.

Now, the question arises how can the Hindu law be developed? The answer is that it must be developed on the same lines (as much as possible) as in the past. The argument that there can be no development of Hindu Law under a non-Hindu sovereign has no force at all because (a) according to Hindu jurisprudence the sovereign has very little to do with the development of Hindu Law and the present non-Hindu sovereign has taken up the attitude of strictest religious neutrality. (b) Most of the commentators, whose works are now the governing authority, flourished when India was under Mahomedan Emperors. This fact can only be explained on the ground that it was not the sovereign but somebody else—the *sishtas*, the commentators, the learned professors at the different seats of learning—had been the means of influencing the legal consciousness of the community, and changing and developing the rules of Hindu law. The common saying in Bengal that the people of the country are connected with Navadwipa—that ancient seat of learning in Bengal—by their *Handi* and *Dari* (beard) clearly shows what enormous influence

(1) *Manu* Bk. XII. 108, 109.

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Influence of
Navadvipa Pandits
on the subject

Navadvipa had and still has over the people of Bengal (1). For the decision of any question of Hindu rites and rituals the people look up to Navadvipa and not to Calcutta for guidance and help. Navadvipa speaks and whole Bengal listens. The ancient University at Navadvipa was really the law-maker for Bengal. True, *Jimutavahan* reigned supreme in Bengal, but his commentators while teaching their students and writing their treatises, under the guise of interpretation, moulded the texts of *Jimutavahana* according to their own views of justice or expediency and sometimes even added to the texts of their master (2). When the students from Navadvipa University went to different parts of the country and gave *Vyavastha* to the people, they gave *Vyavastha* according to the interpretation of the texts as they had been taught at Navadvipa, and if any daring spirit had the boldness to dispute their *Vyavastha* reference was made to Navadvipa *Pandits* as the highest tribunal in the land and unless there was a difference of opinion amongst the Navadvipa *Pandits* and the reference was made not to the *tol* in which the *Pandits*, who originally gave the *Vyavastha*, were taught, then of course there was the chance of the original *Vyavastha* being rejected, but in other cases it was supported and approved by Navadvipa *Pandits*. Thus was the Hindu Law modified, and developed in the *tols* of Navadvipa, whose supremacy was for a time contested by well-known seats of learning like Vikrampur and Khanakul Krishnagar. Under the *aegis* of *Abhiram Swamy* the *Khanakul Krishnagar Somaj* could for a time successfully prefer its claim in the immediate neighbourhood the place. This fact speaks volumes in favour of the position I am seeking to maintain in these pages. But with the spread of malaria and other causes the shining lights of the *Somaj* disappeared and Navadvipa reigned supreme and still holds undisputed sway.

The Calcutta University must have the good-wishes at

(1) On the death of a Hindu his relatives have to throw away their *Handis* or earthen cooking pots and at the expiration of the mourning period have to shave and purify themselves. The period of mourning, after the expiration of which the "shaving and purifying ceremonies" take place, varies according to the caste of the deceased and also according to the relation of the deceased with the mourners and whenever there is a difference of opinion about the length of the period—reference is made to the *Pandits* of Navadvipa for their opinion and that opinion when given, settles the question.

(2) *Purna v. Gopal* (1908) 8 C. L. J. 538. *Prosanno v. Sarat* (1908) 36C. 86, 114 s.c. 8 C. L. J. 200.

least of the Pandits of Navadwipa before it can aspire to occupy that proud position in the country, once occupied by the ancient University of Navadwipa. The Calcutta University will have to train up young lawyers in the light of modern jurisprudence. It will also have to train the Pandits of Navadwipa (not to speak of the *tols* of other places) in the way in which the ancient commentators were taught, taking the Hindu Law not as a lifeless, inert and inelastic body of rules but as an elastic body of rules developing and being capable of further development to meet the exigencies of time.

We have stated before that the proposed Standing Law Commission should consist not only of 2 Professors from the Law College at Calcutta but also 2 members from Navadwipa *tols*. They are the *sishtas* of this age. The *sishtas* were the law-makers in the past and the *sishtas* must develop the law now.

We should also notice here what the *sishtas* could do before, cannot do now for various reasons of which the following two are important viz., (a) Because of the change in the theory of legislation, which has already been noticed in this Lecture. But before leaving this point I shall deal with Sir Henry Maine's observation that the Mahomedan Government was a tax-taking and not a law-making government (1). This statement is not accurate with reference to all branches of Hindu Law. This statement is not applicable to Hindu criminal law and law of evidence, because they were supplanted by the Mahomedan criminal law and law of evidence. True, this was not done in the way in which laws are repealed at the present time, but the result was the same, viz. doing away with certain branches of Hindu Law and introduction of Mahomedan Law. The Mahomedan Government also modified the revenue law of the country. It did not make any law in the way in which the British Indian Government make law at the present time, but it did change the law, root and branch, in some departments of life. Sir H. S. Maine's observation is true so far as the personal laws of the Hindus are concerned. It did not generally interfere with this branch of law and the rules of Hindu law were left undisturbed to develop themselves in the usual way as long as they did not affect the interests of the Government of the day in any way.

Authorities of *Sishtas* curtailed because (a) of the change in the theory of legislation.

Was the Mahomedan Government merely a tax-taking and not a law-making Government?

(b) Because of the change in the constitution of courts.

(1) *Early History of Institutions* p. 384.

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This change has caused a good deal of anomaly in the administration of Hindu Law.

(b) Of the change in the constitution of courts. *Sishtas* and the first glimpse of the doctrine of justice, equity and good conscience.

In the right of the *sishtas* to declare the law we find the first glimpse of the right of the Judges of the modern British Indian Courts to decide cases according to the principle of justice, equity and good conscience. That is why it is proposed that the proposed Standing Law Commission should also have two Judges of the High Court.

The next question is whether there is any means of having the sanction of the *sishtas* and the interpretation of commentators made the *media* of developing Hindu Law.

Sishtas and the Standing Law Commission.

This object can be attained now a days, only by having a Standing Law Commission composed of members who can be called the *sishtas* of the 20th Century. Its constitution and duties have already been mentioned. Approval of any rule of Hindu law by this Commission will take the place of the approval of *sishtas* in course of time, and the Digest prepared under its supervision will take the place of the commentaries of ancient Hindu commentators.

Constitution of Hindu society unfavourable to codification of the personal laws of the Hindus.

There is another objection to codification of personal laws of Hindus and that is the difficulty which arises from the constitution of Hindu society. In Hindu jurisprudence family is the unit of society and in modern jurisprudence individual is the unit. The present day movement is from *status* to *contract* and even the Hindu society is undergoing changes, in this respect, under the silent influence of social and political forces. The phenomenon of gradual disintegration of Hindu joint-family system is noticeable in every direction and the natural consequences of such a transition though not in the shape of social anarchy but in the shape of social discontent are engaging the attention of every well-wisher of the country. Communism is sure to give place to individualism, but this change is to take place slowly and cannot be thrust upon any community. In the primitive stage of civilization communism had its uses, but with the advance of civilization they have disappeared. The laws of joint family relation and property are to be administered amongst the Hindus while the Hindu society is changing its every basis by becoming individualistic and ceasing to be communistic. Some people ask for changes in the law with the result that Bills like *Gains of Learning Bill* and *Hindu Gifts Bill* are being introduced and discussed in British Indian Legislature. Thus arises the important question "what should be the attitude of the Government of the country in such

cases?" Sooner or later this question must be solved. LEC XII

We have got the example of Japan to help us in solving this problem. As in India so in Japan the family and not individual was and to some extent still is the unit of society and it is an interesting and instructive study to Lessons from the history of codification in Japan.

watch the process of transformation, in Japan, from communism to individualism. The new Japanese legislation represents a long step towards individualism, for public rights and duties have been made independent of the "House organization," and property rights and liabilities are allowed not only to all the adult male members of the house but also to married women and minor children. Formally, the "house" is still the legal unit. But within the "house" the law recognizes the modern occidental family i.e. the group consisting of husband, wife, and children, and it accords to the husband as such, and to parents as such, an authority which is independent of that exercised by the head of the house. The authority of the husband over the wife, as defined in the Japanese Civil Code is not very great. As regards property, the Japanese Civil Code has altered the old law, by vesting all property rights in the individual. The subordinate house-members have become *sui-juris*. The property of the married woman is not merged in that of the husband's house, it is not even merged in that of the husband. Succession to property is in large measure independent of the "house organization", but concessions are made to the older system. The result of recent Japanese legislation is that the historic "house" has been left formally in tact, but its economic basis has been seriously weakened, and the personal authority of the head of the house has been diminished. Japanese "House" is destined to disappear and this result will be brought about by the individualistic tendencies which the legislation of the last generation has called into activity.

So in India also joint family system, though in the process of disintegration, will not disappear all at once. In the meanwhile the Government of the country should have the demand for individualistic legislation carefully examined by a competent authority, like the proposed Standing Law Commission or Committee, before taking any step in the matter. The Hindu community, based as it is on families will, in course of time be based on individuals. Individualistic legislation there must be; its rejection will only make matters worse and will lead to social revolution and anarchy. This undesirable event can only be avoided by

Conclusion.

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timely individualistic legislation, and the only machinery for producing such measures is a Standing Law Commission or Committee described above.

APPENDIX A

See Pages 153, 308.

HALLIED'S "CODE OF GENTOO LAWS"

This is really a Digest of Hindu Law. It was compiled by a committee of learned Pandits consisting of .—

1. Ram Gopal Neeāyalunkār.
2. Beereeshur Pūchānun.
3. Kishen Jain Neeavalunkār.
4. Baneeshur Beedyālunkār.
5. Kerpa Ram Terk Siedhant.
6. Kishen Chund Sareb Bhoom.
7. Gorce Kunt Terk Siedhant.
8. Kishen Keisub Terkalungkār.
9. Seeta Ram Bhet.
10. Kallee Sunker Beedyabāgees.
11. Sham Sunder Neeā Siedhant.

(These names have been spelt in the same way as in Hallied's Gentoo Code. Translator's Preface, p. lxxvii)

The original code compiled by these Pandits was translated into Persian and that Persian translation was rendered into English by Nathaniel Brassey Hallied. The title of this book is .—

"A CODE OF GENTOO LAWS OR ORDINATIONS OF THE PUNDITS."

From a Persian translation, made from the original in the Sanskrit Language

BY NATHANIEL BRASSEY HALLIED.

Printed and published in London in M DCC.LXXXI.

Its origin. "The importance of the commerce of India," says Hallied [*A code of Gentoo Law The Translator's Preface* (1781 Ed) pp. ix. x] "and the advantages of a territorial establishment in Bengal, have at length awakened the attention of the British legislature to every circumstance that may conciliate the affections of the natives or ensure stability to the acquisition. Nothing can so favourably conduce to these two points as a well-timed toleration in matters of religion, and an adoption of such original institutes of the country as do not immediately clash with the laws or interests of the conquerors.

"To a steady pursuance of this great maxim, much of the success of the Romans may be attributed, who not only allowed to their foreign subjects the free exercise of their own religion and the administration of their own civil jurisdiction, but sometimes, by a policy still more flattering, even naturalized such parts of the mythology of the conquered, as were in any respect compatible with their own system.

"With a view to the same political advantages, and in observance of so striking an example, the following compilation (the Gentoo Code) was set on foot, which must be considered as the only work of the kind, wherein the genuine principles of the Gentoo Jurisprudence are made public, with the sanction of their most respectable Pundits (or lawyers)... . . . Wherefore a thought suggested itself to the Governor-General, the Honourable Warren Hastings, to investigate the principles of the Gentoo

religion and to explore the customs of the Hindus and to procure a translation of them in the Persian language, that they might become universally known by the perspicuity of that idiom and that a book might be compiled, to preclude all such contradictory decrees in future, and that, by a proper attention to each religion, justice might take place impartially, according to the tenets of every sect. Wherefore, Brahmins, learned in the Shaster (whose names are here subjoined) were invited from all parts of the kingdom to Fort William, in Calcutta, which is the capital of Bengal and Behar and most authentic books, both ancient and modern, were collected, and the original text, delivered in the Hindoo language, was faithfully translated by the interpreters into the Persian idiom. They began their work in May 1773 answering to the month of *Jeyt* 1180 (Bengal style) and finished it by the end of February 1775 answering to the month of *Phagoon* 1182 (Bengal style)."

In this Code Substantive and Adjective laws (civil and criminal) are mixed up. It is divided into 21 chapters and most of the chapters are subdivided into what is called by Halhed sections and each section has been sub-divided into paragraphs corresponding to the sections of the modern Anglo-Indian codes.

CONTENTS OF HALHED'S CODE OF GENTOO LAWS.

- CHAPTER I.—*Of lending and borrowing* Consisting of 5 subdivisions or sections. Each section or sub-division is again divided into paragraphs which are equivalent to sections of modern Anglo-Indian Codes. Section I deals with Interest and section 5 deals with the method of recovering debts. The other three sections (sections II, III and IV) deal with pledges, securities and discharge of debts. Substantive and Adjective laws have been mixed up.
- „ II.—*Of the Division of inheritable Property*. [Consisting of 16 subdivisions or sections. Each section has been sub-divided into paragraphs. This chapter contains fragments of the Hindu Law (especially according to Dayabhaga) of Succession and Inheritance, of joint-property and its partition. Section XVI deals with the acquisition of right of possession in the property of another by usufruct]
- „ III.—*Of Justice*. Consisting of 11 sections. Civil and criminal law mixed up:
- Sec. I Of the forms of administering justice
- „ H. Of appointing a Vakeel or Attorney
- „ III. Of not apprehending an accused party.
- „ IV. Of giving an immediate answer to a complaint.
- „ V. Of plea and answer.
- „ VI. Of two sorts of answer, proper and improper.
- „ VII. Of evidence
- „ VIII. Of proper and improper evidence
- „ IX. Of the modes of examining witnesses
- „ X Of appointing arbitrators more than once; and of the mode of drawing up the statement of a cause.
- „ XI Of giving preference to a claim.
- „ IV.—*Of Trust or deposit*. (1 section subdivided into paragraphs).
- „ V.—*Of Selling a Stranger's property*. (1 section subdivided into paragraphs).
- „ VI.—*Of Shares*. (2 sections. Sec. I. of shares of trade in partnership. Sec. II. Of shares of artificers)
- „ VII.—*Of Gift or Alienation by gift*. (1 section).

- „ VIII.—*Of Servitude* (3 sections)
- Sec. I Of appellations of apprentices, servants, slaves, etc.
- „ II Of the modes of enfranchising slaves
- „ III Of such as are slaves, and of such as are not slaves.
- „ IX.—*Of Wages* (2 sections)
- Sec. I Of the wages of servants (including specific performance of contract and damages)
- „ II Of the wages of dancing women or prostitutes
- „ X.—*Of Rent and Hires* (1 section)
- „ IX *Of Purchase and Sale* (2 sections.)
- Sec. I Of the vendor's not delivering up to the purchaser the commodity sold, and of the Magistrate causing him to deliver it
- „ II Of returning or not returning articles purchased
- „ XII.—*Of Boundaries and Limits* (1 section)
- „ XIII.—*Of Shares in the Cultivation of Lands.* (1 section)
- „ XIV.—*Of Cities and Towns, and of the Fines for damaging a crop*
(1 section The word *Gram* has been translated as a town.)
- „ XV.—*Of scandalous and bitter expressions* (2 sections)
- „ XVI.—*Of Assault.* (3 sections)
- „ XVII.—*Of Theft.* (6 sections)
- „ XVIII.—*Of Violence.* (1 section.)
- „ XIX.—*Of Adultery*—(8 sections)
- „ XX.—*Of what concerns Women.* (1 section)
- „ XXI.—*Of Sundry Articles.* (10 sections)
- Sec. I Of gaming.
- „ II. Of finding anything that was lost.
- „ III. Of the fines for cutting trees
- „ IV. Of the tax upon buying and selling goods.
- „ V. Of the quarrels between a father and son
- „ VI Of serving unclean victuals
- „ VII. Of the punishment to be inflicted on a Soodar for reading the *Beids* (Vedas)
- „ VIII. Of the properties of punishment
- „ IX Of adoption.
- „ X. Of Sundries.

APPENDIX B

See page 171

LIST OF BRITISH INDIAN LEGISLATIVE COUNCILS.

Date of constitution.	Name of the Legislative Council.
1773	Council of the Governor-General.
1802	Council of the Governor of Madras
1807	Council of the Governor of Bombay.
1833	Councils of the Governor of Bombay and Madras were abolished and only one Legislative Council was established for whole of India.
1861	Bombay and Madras Legislative Councils re-established
1862	Legislative Council for the Bengal Division of the Presidency of Fort William established.
1886	N. W. P. and Oudh Council established.
1897	The Punjab Council established
1898	Burma Council established.
1912	Council for Behar and Orissa established
1912	Do Assam constituted.

STATEMENT SHOWING THE CHANGES IN THE COUNCIL OF THE GOVERNOR-GENERAL

(From 1833 to 1861 Governors of Bombay and Madras had no legislative Council)

N B.—Following numbers do not include H. E. the Governor-General nor the head of the Province in which the Council sits

Years.	Ordinary members	Extraordinary	Additional members.
1773—1784	4	1	None.
1784—1833	3	1	Do
1833—1853	4	1	Do.
1853—1861	4	1	6
1861—1874	5	1	Not less than 6 not more than 12
1874—1892	6	1	Not less than 6 not more than 12.
1892—1909	6	1	Not less than 10 not more than 16.
From 1909	6	1	Not more than 60.

COUNCILS OF THE GOVERNORS OF MADRAS AND BOMBAY.

From 1802 (Madras) and 1807 (Bombay) up to 1833	..	Governors in Council of Bombay and Madras had Legislative authority
1833—1861	..	No Legislative Council
1861—1892	..	Executive members and Additional members not less than 4 and not more than 8.
1892—1909	...	Executive members and Additional members not less than 8 and not more than 20.
1909—up to present day	..	Executive members and Additional members not more than 50.

LEGISLATIVE COUNCIL, OF THE LIEUTENANT-GOVERNOR OF BENGAL.

1862—1912.

From 1773 to 1802	The Council of the Governor-General was the only Legislative Council in Bengal. At the first meeting of Bengal Legislative Council in 1802 only 11 members were present.
1802—1909	.. Number of members not to exceed 20.
1909—1912	.. Do. Do 50.
1913	In 1912 Bengal was raised to the <i>status</i> of a Presidency under a Governor with an Executive Council. In addition to 48 elected and nominated seats, provision has been made for the nomination of 2 expert members.

COUNCIL, OF THE UNITED PROVINCES OF AGRA AND OUDH

Up to 1886	No Legislative Council.
1886	Council established by the Proclamation of the 26th November 1886 under §44 of the Indian Councils Act of 1861 (21 and 25 Vic. 67)
1892—1909	.. Number of members not to exceed 15.
1909—up to present day	.. Do. Do 50.

THE PUNJAB COUNCIL.

Established by the Proclamation of 9th April 1897 under the provisions of Sections 14 and 49 of the Indian Councils Act, 1861 (21 and 25 Vic. c. 67.)

1897—1909	.. 9 Members.
1909—up to present day	.. Not to exceed 30.

BURMAH COUNCIL.

Burma Legislative Council constituted by a Proclamation dated the 9th April 1897.

1898—1909	.. 9 Members.
1909 to present day	.. Not to exceed 30.

THE BIHAR AND ORISSA COUNCIL.

Constituted in 1912

Consists of 21 elected and 19 nominated members. Besides these members there may be an expert member, either an official or non-official, to assist the progress of particular legislative measure.

THE ASSAM COUNCIL.

Constituted in 1912.

Consists of 11 elected and 13 nominated members. The Chief Commissioner is also empowered to nominate one expert member, either official or non-official, to assist in the progress of legislative measures.

APPENDIX C

See page 251.

Under Clause 69 of the Charter granted by Geo. II. to the East India Company in 1753 the Mayor's Courts at Madras, Bombay and Calcutta granted Probates of Wills and Letters of Administration to Hindus and Mahomedans. [See Mr Justice Hyde's Mss. notes for 1791, 4th Term, October 22, 1791. See also *In the Goods of Bibee Muttra*. (1832) *Morton's Decisions* 191, 224.] The reason why this power was conferred on the Mayor's Courts in 1753 is clear from that Clause "And whereas it frequently happens" runs the clause "that the effects and estates of persons dying in the East Indies or parts aforesaid are wasted and embezzled and their debts contracted there remain unpaid for want of a proper authority vested in some person or persons residing in the East Indies or parts aforesaid to take care of the same for the preventing of which mischief We do hereby for us give and grant unto the said Company and their successors and do by these presents ordain establish and appoint that when any person shall die within the said town of Madraspatnam or Fort St. George or the limits thereof or any of the factories subordinate to Fort St. George aforesaid the said town of Bombay in the island of Bombay or the limits thereof or the factories subordinate thereto or the said town of Calcutta at Fort William in Bengal or the limits or districts of the same or the factories subordinate thereto and shall by his will appoint any person or persons residing within the towns or the limits thereof or the factories aforesaid to be his executor or executors that in such case the Mayor's Court within the district or jurisdiction whereof such person shall happen to die upon proof made of the due execution of the said will shall and they are hereby authorized to grant probate of the said will under the seal of the said Court whereby the person or persons so named executor or executors shall have full power and ample authority to act as executor or executors as touching the debts and estate of his, her or their testator within the limits of trade granted to the said Company and where any person shall die within any of the said Towns or Factories etc. intestate or not having appointed some person or persons to be his executor or executors residing within the said towns that in either of these cases the said Mayor's Court shall and the same is hereby empowered to grant letters of administration or letters of administration with an authentick copy of the will annexed etc. etc."

The Supreme Court was established in 1774, but it did not meet for the purpose of transacting any business until January 1775. From January 1775 to July 1782 upwards of 200 probates and administrations of the wills and effects of Hindus and Mahomedans were granted.

It appears from the manuscript notes of Mr Justice Hyde that probate and letters of administration were granted by the Supreme Court, in that period, because Hindus and Mahomedans were British subjects within the meaning of Clause 22 of the Charter. In the first term of 1775 on an application of one *Chowdranny* widow of *Bennaker Doss*, for administration to the goods of her late husband, Mr. Justice Hyde made the following remarks: "Query, by me (John Hyde) in what right we can exercise any jurisdiction in granting probate of the will of a *Gentoo*? We cannot, I think, exercise jurisdiction as an ecclesiastical Court, but amongst Christians; therefore if we have authority, it must be by some other kind of authority for proving wills." Next year, in the 1st Term 1776, in the case of *Commula*, widow of *Kebuliam Ghose*, a Hindu, the Court doubted, and took time to consider whether administration of the goods of a Hindu should ever be granted. Impey C. J. and Chambers J. thought

that the administrator would be bound to administer according to the *Statute of Distributions*. Le Maistre and Hyde JJ differed. Mr Justice Hyde made the following note:—"It was determined that administration of the goods of Hindus should be granted, and that the administrator would be bound to distribute according to the Hindu customs." In the same note-book there is another note upon the subject, dated the 17th December 1779. "The Charter directs administration to be granted to British subjects, and of the goods of British subjects deceased, therefore the Court grants administration to the estates of *Gentoo*s (as well as other persons) dying in Calcutta, and to *Gentoo*s inhabiting Calcutta, adjudging them to be British subjects."

It appears from various cases that the court continued for several years up to July 1782, to exercise this jurisdiction, and upon the same ground, viz of being *British Subjects*. In 1778, 11th Term, *In the goods of Bindabun Gosain*, Sir Elijah Impey said—"I was at first against granting any administration to Hindus, thinking it would create confusion I acceded to the opinion of other Judges (Le Maistre and Hyde JJ) and agreed that administration to Hindus, under the description of British subjects should be granted." In 1781 an application for letter of administration in the *Goods of Rajah Nanda Kumar* was made by a creditor of the Rajah. The following are the entries about it in Mr Justice Hyde's Note-Book.

1781. 1 TERM THURSDAY NOVEMBER 15th 1781

Present—Sir Robert Chambers and Mr. Justice Hyde at 10^o 25.

In the Goods of Rajah Nandocomar Deceased.

Mr. Hare. Moved to appoint a day to argue the caveat of Rajah Goordas the son of Nundocomar.

The Petitioner had applied for administration in order as he said to obtain payment to himself of the money which had been paid on the Bonds for the Forgery of which Nundocomar was hanged in the year 1775 about the month of July.

Sir Robert Chambers. At this distance from England I think we ought to take care to do nothing that may infringe the rights of the Crown. *There is no officer of the Crown here* to take care of them, or to receive the forfeiture due to the King. We have no authority to do so, but yet I think we must take notice of a fact so notorious as that Nundocomar was executed for Felony, and the Ecclesiastical Court cannot grant administration of the Goods of a man executed for Felony.

Hyde. It is open to argument whether the Court may grant administration and how the fact shall be brought before the Court that we may take notice of it. It is said this administration is applied for, to obtain payment of the money from the effects of Nundocomar, which he had received on the forged Persian Bonds for the Publication of which he was hanged.

If no person claims on the part of the King I do not know we are under any obligation to take notice of the forfeiture.

Whoever possesses the Goods will be accountable to the King, when any claim is made whether it be the Administrator or the son of the deceased.

Chambers—There is no objection to appointing a day for argument of the caveat. It cannot be heard in this sitting and the Ecclesiastical courts are strict in observing the distinction of Terms and vacations. Let the first Thursday in the next term be appointed for arguing the caveat.

This matter again came up before the Court on January 17, 1782 of which the following is the entry:—

1782 1st Term. January 17, 1782

In the Goods of Rajah Nundocomar Bahadur, Deceased.

The Petition of Balgovind Doss.

The caveat of Rajah Grudoss.

The Petition states Nundocomar was a British subject, and died intestate.

That Balgovind is a creditor as administrator of

Mr. *Davies*, for the caveator Rajah Goordas objected that it now appears by affidavit that Goordas is the only son of Nundocomar, and that he was executed for Felony

Sir E. Impey I think Rajah Goordas being the son is out of the question because he does not petition for administration.

Hyde. *Contra*.

Time to next Thursday to consider Afterwards time to next term.

There is no reference to this application in Mr. Justice Hyde's Note-Book for the 2nd Term 1782, but there is the following entry about another application viz. *In the Goods of Bengaley Gawney*, Mr. Justice Hyde made the following note—"The person of whose goods administration is to be granted must have been at his death a British subject, his being amenable to the jurisdiction of the court is nothing to the purpose. We say, the inhabitants of this Town are all British subjects, because the town was conquered by Admiral Watson and Col. Clive, but that does not extend to subordinate factories"

About this time the practice of granting probates of Hindu and Mahomedan Wills ceased and the reason for the cessation of the exercise of the jurisdiction after June 1782 has been given by Mr. Justice Hyde *In the goods of Hadjee Mustapha* (in 1791).

"Although" says Mr. Justice Hyde (Mr. Justice Hyde's Notes for 1791 4th Term October 22. 1791) "in conformity to the practice of the *Mavous courts* here and at Madras and Bombay the court (Supreme court at Calcutta) had granted Probate and Administration of the goods of Hindus and Mahomedans from the establishment of this court on Saturday, October 22nd 1774 until the Statute of 21 Geo. III chapter

(In Mr. Justice Hyde's note there is no mention of the chapter but it is clear that he refers to 21 Geo III c. 70) arrived here, (In July 1782. See Hyde's notes.) which altered the jurisdiction of this court, and at that time the court resolved that the Statute was a prohibition of granting Probate of the Wills or Administration of the Goods of Hindus or Mahomedans, and since that time it never has been done

"Possibly in some cases Wills may be proved by suit in the Court of Equity"

From 1782-1816 there is an entire cessation of the practice of granting probates to Hindu Wills by the Supreme Court In 1816 the Supreme Court resumed the practice of granting probates and letters of administration to the Hindus and Mahomedans

In 1819, 3rd Term *In the goods of Bebee Hay*, a Mahomedan lady who died in Calcutta intestate, letters of administration were applied for on the part of the Registrar, and Spankie A. G. and Mr. Compton, in opposition to the application, contended, that even under the general ecclesiastical authority of the court, there was a marked distinction between foreign Europeans or Christians, and Mussulmans and Hindus, the laws of inheritance and succession of the latter being expressly reserved to them by the Charter and the Statute 21 Geo. III, and the majority of the court (East C. J. and Buller J.) not being satisfied that the registrar could take out administration to a Mussalman under the restriction in the Act, proposed that the matter should be referred, and some compromise was made.

But whatever might have been the cause of the cessation in 1782, one thing is clear viz. that the Supreme Court acted in the matter upon the ground, that certain Hindus and Mahomedans, viz. those who resided in the Calcutta District, were comprised in the term "British subjects" in §22 of the Charter.

About the practice of granting Probates and Letters of Administration to Hindus and Mahomedans Sir E. East said (Paper delivered by Sir E. II. East to the Lords'

Committee on East India affairs.) that the Hindus desired to obtain probate in some instances, and that Government had refused to pay money to one who claimed to be the representative of a deceased Hindu, without assurance of his representative character, and that he "could devise no better method, in justice to both parties, than to admit the party so claiming, at his own request, to deposit the will, as in registry, with the registrar of the court on the ecclesiastical side, and to administer a voluntary oath at the Hindu executor's request, verifying the will, and his own representative character. But by way of precaution, and that no person might be misled by it, to attribute a greater authority than belonged to such an act, I directed the registrar to draw up the verification in writing, which was to be given to the party by way of memorial of his claim, as having been made voluntarily, and noting that the will was not registered, but voluntarily deposited as in registry." Sir Edward East in a note adds "we have since permitted the Hindus to take Probate of wills, and letters of Administration, at their own free will, but do not hold it necessary for them in order to give title." Thus we see that by the year 1816 the practice of granting probate of Hindu Wills was revived but it was granted not on the same ground as before, i.e. it was granted not on the ground of jurisdiction, but on the ground of mere convenience and accommodation. How long the proceeding lasted upon the principle of mere convenience and accommodation does not precisely appear, but it is clear that for some years previous to November 1832, the Court must have adopted the ground of jurisdiction. Between 1816-1832 the Supreme Court granted Probates and Letters of Administration in 230 cases.

In 1832 this question was finally settled in the *Goods of Muttra Bebec*

Thus we see that in the Presidency towns probates of the wills and letters of administration to the estates of deceased natives of India were granted under the Supreme Court Charters, but the representative status conferred by such grants fell far short of that conferred by similar grants in the case of deceased European British subjects. In 1867 Norman J. held that a Hindu executor took nothing from any grant of the Court. "His title" said that learned Judge (*Shano Bibi v Baldeo Das* 1 B. L. R. O. J. 24) "is founded solely and simply on the will of the testator, considered as an instrument of gift. Except for the purposes of evidence, the will of a Hindu does not require probate. As against those who get the probate or oppose the grant of it, (it) is no doubt binding, as against parties cited it is evidence, but it has no greater effect than the ordinary decree in a Civil Court against persons who have no means of appearing in the suit or right to dispute the grant."

In the Mofussil the *Bengal Wills and Intestacy Regulation* (Reg V of 1799) is the first British Indian enactment on this subject. "Doubts having been entertained" runs the preamble of that Regulation "to what extent, and in what manner, the judges of the Zillah and City courts of *dewandiy adawlut* in the provinces of Bengal, Behar, Orissa and Benares, are authorized to interfere in cases wherein the inhabitants of the above provinces may have left wills at their decease, and appointed executors, to carry the same into effect, or may have died intestate, leaving an estate real or personal, with a view to remove all doubts on the authority of the Zillah and City courts in such cases; and to apply thereto, as far as possible, the principle prescribed in §15 of Reg IV of 1793, viz., that in suits regarding succession and inheritance, the Mahomedan laws with respect to Mahomedans and the Hindu laws with regard to Hindus, be the general rules for the guidance of the judges, the Vice-President in Council has passed the following regulation." Under this Regulation executors of the wills of Hindus and Mahomedans could take charge of the estate of the deceased and proceed in execution of their trust, without any application to the judges, or other officers of Government. The courts of justice were prohibited to interfere in such cases except on a regular complaint. Under certain circumstances the court could appoint an administrator for taking care of and managing the estate of an intestate and the administrator had to give security. Section VII of this Regula-

tion contained the rule for the guidance of judges in cases of persons dying intestate and leaving personal property to which there may be no claimant.

Till the passing of the *Probate and Administration Act* 1881 there were no means of conferring upon any one a complete and conclusive title as representative of the estate of a deceased Hindu, Mahomedan or Buddhist or other person exempt from the operation of the Indian Succession Act. The operation of the *Hindu Will Act*, 1870 was limited to the Presidency Towns and Lower Bengal and applies only to cases of testamentary succession among Hindus. Outside the Presidency towns there was no power to grant letters of Administration in the case of Hindus, Mahomedans and Buddhists dying intestate. The grant of a certificate under Act XXXVII of 1860 made the person who had obtained it a representative only for certain very limited purposes ; i.e. for the recovery of debts, the receipt of interest and dividends on Government securities, bank shares &c.

From this state of things much trouble and litigation resulted. The heirs might be very numerous, their interests might differ in degree, some of them might be minors or otherwise incapacitated, others might be residing at a distance, the titles of some might be disputed, the settlement of claims against the estate might thus be a matter of endless complication, the making of a satisfactory title to any portion of it which it might be necessary to sell might be impossible. A Hindu or Mahomedan will, requiring no proof, need not be deposited for safe custody. The resulting opportunities for forgery and fraudulent alteration were obvious. Nor could such an executor be compelled to exhibit an inventory or account of his testator's estate except by the tedious, expensive and hazardous process of a law suit. The consequence was that when the estate was too small to bear the costs of the suit, women, children and absentees had no adequate check on the executor. The necessity of devising some means of removing these difficulties was brought to the notice of the Government of India with the result that the *Probate and Administration Act* was passed in 1881 (See also author's article "*Development of Law of Testamentary Power of Hindus in Bengal*" in 19 C. L. J. 591--601 etc.).

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